

MISSISSIPPI LAW JOURNAL



ARTICLES

SECURITY INTERESTS IN FIXTURES UNDER MISSISSIPPI'S UNIFORM COMMERCIAL CODE

Daniel Fenton Adams

THE POPULATION APPORTIONMENT PRINCIPLE: ITS DEVELOPMENT AND APPLICATION TO MISSISSIPPI'S STATE AND LOCAL LEGISLATIVE BODIES

*Thomas Vocino, John H. Morris,
and D. Steve Gill*

COMMENT

GOING PRIVATE AND RULE 10b-5: THE *GREEN* AND *MARSH* DECISIONS

This team is ready to serve your Mississippi title insurance needs.

Write Rowan H. Taylor or John T. Cossar for information on our title insurance plans and requirements for being listed as an approved attorney.



Mississippi Valley Title Insurance Company

Home Office: Jackson, Mississippi / 315 Tombigbee / P. O. Box 2428
Branch offices in Birmingham, Memphis, Mobile
Offices or agents in Miss., Ark., La., Ala., Fla., N.C., S.C., Tenn., and Ga.

DEPOSIT GUARANTY HAS MORE PEOPLE WITH MORE EXPERIENCE HANDLING MORE FUNDS THAN ANY OTHER TRUST OPERATION IN MISSISSIPPI.

Deposit Guaranty's 14 trust officers represent a cumulative total of over 200 years of experience in every phase of trust operations. This expertise is augmented by a staff of 50 departmental trust specialists. We welcome every opportunity of putting this capability to work for you in creating financial security for our mutual clients and customers.



TRUST DIVISION

DEPOSIT GUARANTY NATIONAL BANK

Grow With Us/Jackson, Miss./Member F.D.I.C.

TRUST BRANCH OFFICES:

Greenville	Greenville Bank
Greenwood	Leflore Bank
McComb	Mechanics Bank
Natchez	City Bank



Teamwork. Mid-South Title's National Department works hand-in-hand with Mississippi attorneys in real estate title matters—an important reason we lead the league in the Mid-South.
Sole agent for Commerce Title Guaranty Co.

MID-SOUTH TITLE COMPANY

12 South Main Street Memphis, Tennessee 38103
W. J. "Bill" Gallagher, Senior Vice Pres. 901/523-8121



The MISSISSIPPI LAW JOURNAL is published by University of Mississippi law students five times annually in January, April, June, September, and November. Editorial and business offices: Mississippi Law Journal, P.O. Box 146, University, Mississippi 38677.

Current subscription: \$12.00 per year. Single issue, \$3.00. Subscriptions are renewed automatically upon expiration unless the subscriber sends notice of termination.

Change of address: Members of the Mississippi State Bar send address changes to the Mississippi State Bar, P.O. Box 1032, Jackson, Mississippi 39205. All other subscribers send address changes directly to the Mississippi Law Journal. Include name, new address (including zip code), and old address. Please notify 45 days in advance to ensure prompt delivery.

Unless a claim is made for nonreceipt of Journal issues within 6 months after the mailing date, the Mississippi Law Journal cannot be held responsible for supplying those issues without charge.

Second class postage paid at University, Mississippi 38677 and additional mailing offices.

Citations conform to *A Uniform System of Citation* (11th ed. 1967), copyright by the Columbia, Harvard, and University of Pennsylvania Law Reviews and the Yale Law Journal.

The Mississippi Law Journal is a member of the National Conference of Law Reviews.

The JOURNAL seeks to print matter of merit and interest; being desirous of offering freedom to contributors, it assumes no responsibility for the views expressed herein.

One Key Number gives me all cases in point

in California...

in Illinois...

in New York...

in any jurisdiction in the United States

Cal.App. 2d, 35 C. 769

95. — Saws, grinders, and cutters.

Cal.App. 1973. Where, in action for wrongful death of welder allegedly occasioned by disintegration of grinding wheel being operated at too high a speed, evidence showed that increases in speed of tool due to wear were noticeable to operator and that tool bore warnings as to operation at excess speed, manufacturer was entitled to have jury evaluate evidence as to possible contributory negligence of welder in

95. — Saws, grinders, and cutters.

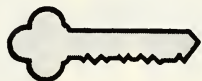
C.A. Ill. 1967. Where evidence of plaintiff who was injured by disintegration of grinding wheel showed no fault on his part and pointed to manufacturer of the wheel as cause of the injury, and manufacturer's evidence disclosed no specific fault on its part and pointed to a cause external to the wheel itself, submission of case to the jury was justified.—Bustamante v. Carborundum Co., 275 F.2d 811, 32-2 U.S. 2d 811.

95. — Saws, grinders, and cutters.

N.Y. A.D. 1959. In action to recover for personal injuries sustained as result of breaking of grinding wheel or disc manufactured by defendant, evidence as to whether defendant failed to use due care in testing wheel after manufacture thereof was insufficient to require submission to jury.—Doyle v. Carborundum Co., 192 N.Y.S.2d 228, 9 A.D.2d 765.

With West's exclusive Key Number System, I can check my local Key Number Digest and instantly have access to all reported cases on that point. And this same Key Number will work in any other state digest, in any jurisdiction in the United States. This gives you instant access to all cases of all jurisdictions.

Save time and work. Start your search with West's Key Number System. To get full details, write today.



WEST'S KEY NUMBER SYSTEM
—the exclusive research
system for lawyers.

**WEST
PUBLISHING
COMPANY**

John W. Hamilton
623 South McDonough Street
Montgomery, Al 36104
Phone: 205/834-7872

Matthew D. Wiggins, Jr.
P.O. Box 13
Clinton, Ms 39056
Phone: 601 924-4194

We'll pay you to retain our firm.

Professionals like dealing with professionals. That's why more and more Mississippi lawyers are retaining Unifirst for all their investment needs. Whether it's for a short-term investment or for larger estates and court-controlled funds, Unifirst is the place to keep money secure while it earns a handsome return for you or your clients.

Our Daily Interest Accounts begin earning the moment you make a deposit, and continue earning until you take it out. Just right for idle operating funds or for money soon to be transferred.

Larger, long-term amounts can work for you in one of our Certificates of Deposit. And all of our accounts are FSLIC insured.

Unifirst has systematic savings and pension plans to provide for the financial future of those you're concerned about. Professionally or personally.

Your time is valuable. Unifirst accounts can be opened, maintained and drawn upon by mail. Or by telephone, using our DialAccount service. If you like, we'll visit you personally.

Of course, all our business is held in the strictest confidence.

Call us today. One of our representatives will show you how retaining our firm can be a landmark decision for **your** firm.



Unifirst Federal Savings and
Loan Association
P. O. Box 1818
Jackson, Mississippi 39205
Phone 948-8700, Ext. 202

RESEARCH ASSISTANCE IS AVAILABLE TO ATTORNEYS

Take advantage of the library facilities of the University of Mississippi School of Law by sending your legal problems to be researched through the facilities of the Phi Alpha Delta Legal Research Exchange. Qualified students will research your legal problems for the nominal cost of \$5.00 per hour plus a base fee of \$5.00 for each project. If you need xerox copies of materials in the library, the cost is 10¢ per page plus a \$5.00 base fee if the xeroxing is not in conjunction with a research project. For further information write or call:

LEGAL RESEARCH EXCHANGE

Box 30, School of Law
University, Mississippi
38677

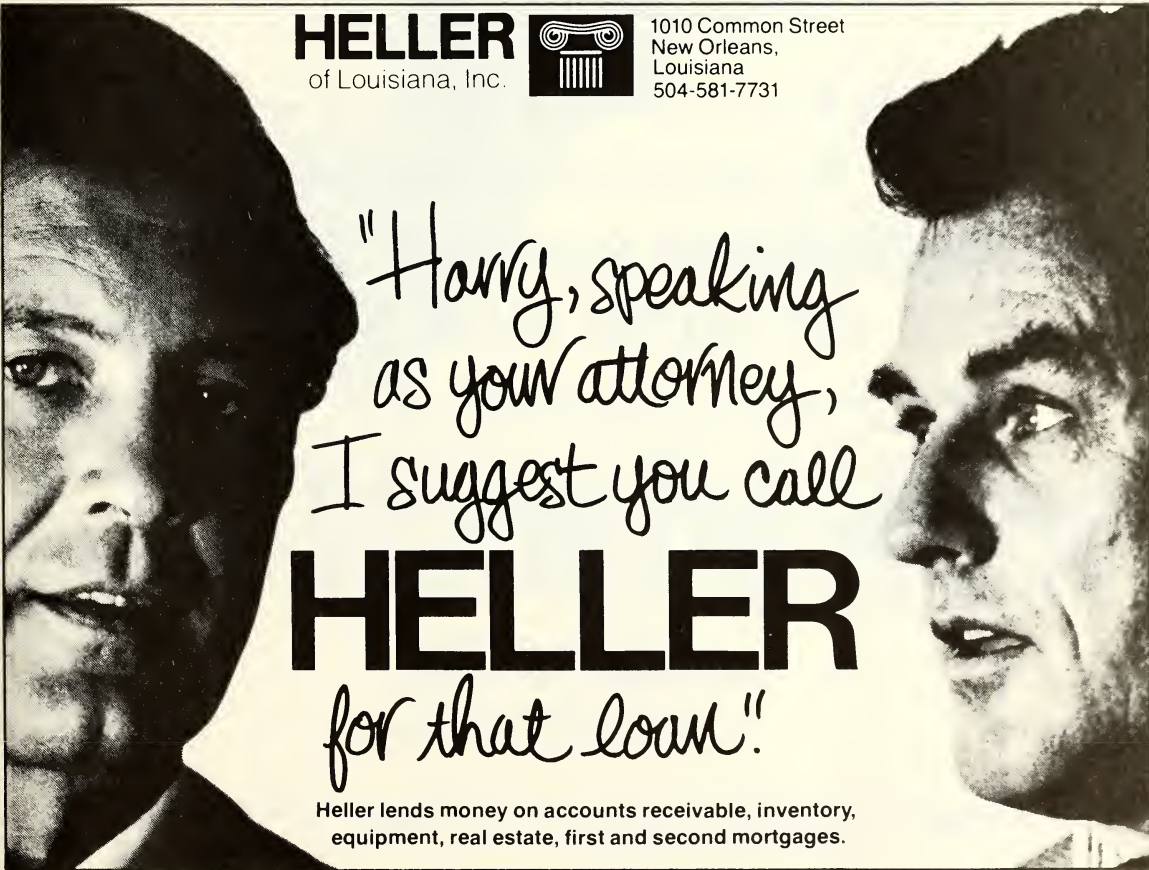
* * *

Phone 232-7361

HELLER
of Louisiana, Inc.



1010 Common Street
New Orleans,
Louisiana
504-581-7731



*"Harry, speaking
as your attorney,
I suggest you call
HELLER
for that loan."*

Heller lends money on accounts receivable, inventory,
equipment, real estate, first and second mortgages.

Handwriting Expert

GILBERT J. FORTIER, JR.

Examiner of Questioned Documents

Since 1946

Scientific identification of questioned handwriting, handprinting, typewriting, ink, paper, alterations, erasures, obliterations, etc. Complete laboratory equipment consisting of specially adapted cameras, lenses, microscopes, measuring devices, chemicals, ultra-violet and infra-red apparatus, paper and ink testing devices, and all other necessary scientific instruments. Qualified witness in Federal and State Courts, civil and criminal, regarding documentary disputes. Photographic exhibits prepared for court demonstration. Portable equipment for examining and photographing filed and impounded documents at any location.

3024 DE SOTO ST. — PH. (504) 482-8160
NEW ORLEANS, LA. 70119

Will you miss the latest decisions?

MISSISSIPPI SUPREME COURT DECISIONS AVAILABLE

Be informed and keep your research up to date. Subscribe to the **Mississippi Law Journal** briefs of decisions of the Mississippi Supreme Court. Briefs are written by **Journal** members and mailed by Friday of the week the decisions are rendered, several weeks before the cases are printed in the regional reporter. You can receive this weekly publication and be up to date for only \$20.00 per year—an indispensable service! Subscribe now, or write for a free sample of the most current briefs.

Send Subscription Order to:
MISSISSIPPI LAW JOURNAL
P. O. Box 146
University, Mississippi 38677



Chicago Title has the reputation of being a very professional national title insurance company. (We thank our customers for their comments and confidence.) But you earn a national reputation by being knowledgeable of the local real estate in every single market you serve. You get there by "walking" each territory stone by stone, building by building, market by market. There's no other way.

It's true we're national. But we got there locally. And we'll continue to be the local national title insurance company. That's how we've grown for over 125 years.



Chicago Title Insurance Company

124 offices and over 1,300 agents in 46 states

Suite 100, South Congress and Pearl St., Jackson, MS 39205 • (601) 969-0313

Stone by Stone

At Chicago Title, we always remember...your reputation is as important as ours.
That's why we deliver the best.

Mississippi Law Journal

JOURNAL of the MISSISSIPPI STATE BAR and
the UNIVERSITY of MISSISSIPPI SCHOOL OF LAW

VOLUME 47

NOVEMBER 1976

NUMBER 5

Copyright © 1976, Mississippi Law Journal

TABLE OF CONTENTS

ARTICLES

- SECURITY INTERESTS IN FIXTURES UNDER MISSISSIPPI'S UNIFORM COMMERCIAL CODE *Daniel Fenton Adams* 831

- The Population Apportionment Principle: Its Development and Application to Mississippi's STATE AND LOCAL LEGISLATIVE BODIES *Thomas Vocino, John H. Morris, and D. Steve Gill* 943

COMMENTS

- GOING PRIVATE AND RULE 10b-5: THE *Green* AND *Marshall* DECISIONS 981

RECENT DECISIONS

- CONSTITUTIONAL LAW—STATE ACTION—NOMINAL LEASE OF MUNICIPAL LAND, COUPLED WITH NONENFORCEMENT OF CITY ORDINANCES PROHIBITING RACIAL AND RELIGIOUS DISCRIMINATION, NOT SUFFICIENT TO IMPLICATE THE STATE (*Golden v. Biscayne Bay Yacht Club*, 5th Cir. 1976) 1011

BOOK REVIEWS

- SIMPLE JUSTICE *Ben O. Weeks* 1023
- THE JUDGE *Guthrie T. Abbott* 1027

MISSISSIPPI LAW JOURNAL BACK ISSUES — CUMULATIVE INDEXES

Back Issues for Volumes 1-46	\$3.00
New Index for Volumes 31-40	6.00
Index for Volumes 21-30	3.00
Index for Volumes 1-20	3.00
Complete Set of Above Indexes	10.00

Send order to:
MISSISSIPPI LAW JOURNAL
P. O. Box 146
University, Mississippi 38677

Mississippi Law Journal

JOURNAL of the MISSISSIPPI STATE BAR and
the UNIVERSITY of MISSISSIPPI SCHOOL OF LAW

VOLUME 47

NOVEMBER 1976

NUMBER 5

MISSISSIPPI STATE BAR

1976-1977

OFFICERS

ERSKINE W. WELLS of Jackson President
ELZY J. SMITH of Clarksdale President-Elect
JAY A. TRAVIS III of Jackson Second Vice-President
GEORGE VAN ZANT of Jackson Executive Director and
Secretary-Treasurer

COMMISSIONERS

O. R. SMITH, JR.	Corinth	JAMES C. PITTMAN	Hattiesburg
CONO A. CARANNA II	Biloxi	GEORGE WILLIAMSON	Mendenhall
ARMIS HAWKINS	Houston	J. HAROLD GRAHAM, JR.	Crystal Springs
NORMAN C. BREWER	Greenwood	DONALD G. KRUGER	Prentiss
JAMES MAYO	Louisville	DEWITT T. HICKS, JR.	Columbus
E. C. WARD	Natchez	D. BRIGGS SMITH, JR.	Batesville
CRYMES G. PITTMAN	Jackson	C. DENTON GIBBES, JR.	Laurel
W. H. JOHNSON, JR.	Decatur	W. ROBERTS WILSON, JR.	Pascagoula
LUCIUS DABNEY, JR.	Vicksburg	CARL ROBERT MONTGOMERY ...	Canton
J. LES PRITCHARD	Meridian		
ALFRED A. LIVINGSTON	Cleveland		

MEMBERS OF THE LAW SCHOOL LIAISON AND EDUCATION COMMITTEE

LOWELL E. GRISHAM, *Chairman*
Oxford

ROLAND D. MARBLE, *Vice-Chairman*
Jackson

WALTER W. EPPES, JR.
Meridian

LESTER F. SUMNERS
New Albany

HARVEY HENDERSON
Sumner

SECURITY INTERESTS IN FIXTURES UNDER MISSISSIPPI'S UNIFORM COMMERCIAL CODE

*Daniel Fenton Adams**

TABLE OF CONTENTS

I.	THE 1962 OFFICIAL TEXT	835
A.	<i>The Meaning of "Fixtures"</i>	836
B.	<i>The Priority Rules</i>	841
	1. The First Priority Rule	841
	2. The Second Priority Rule	844
	3. The Third Priority Rule	846
	4. Exceptional Priority Rules	847
	a. <i>Subsequent Purchasers</i>	847
	b. <i>Subsequent Lien Creditors</i>	849
	c. <i>Prior Encumbrancers Making Subsequent Advances</i>	851
C.	<i>The Removability Rule</i>	855
D.	<i>Perfection Rules</i>	856
	1. What to File	857
	2. Where to File	858
	3. The Secured Party's Dilemma	858
E.	<i>Some Loose Ends</i>	861
	1. Combined Mortgages	861
	2. Tenants' "Fixtures"	863
	3. Contractors' "Fixtures"	866
	4. Inconsistency Between Sections 9-313 and 9-312	867
	5. The Threat of <i>Moore v. Bay</i>	868
	6. The Problem of "Waste"	869
II.	MISSISSIPPI'S UNIFORM COMMERCIAL CODE	869
A.	<i>Perfection Rules</i>	870
	1. Form of Financing Statement	870
	2. Instructions to Filing Officers	872
	3. Goods Becoming Fixtures After Security Interest Attaches	873
	4. Perfection "Against the Real Estate"	875
	5. Utilities' Fixtures	878
B.	<i>Priority Rules</i>	879
	1. Security Interests Attaching to Goods Before They Become Fixtures	879

* Professor of Law, University of Mississippi (presently Visiting Professor of Law, Stetson University School of Law); A.B., 1947 Dickinson College; LL.B., 1949; J.D., 1968, Dickinson School of Law.

Mississippi Law Journal

JOURNAL of the MISSISSIPPI STATE BAR and
the UNIVERSITY of MISSISSIPPI SCHOOL OF LAW

VOLUME 47

NOVEMBER 1976

NUMBER 5

MISSISSIPPI STATE BAR

1976-1977

OFFICERS

ERSKINE W. WELLS of Jackson President
ELZY J. SMITH of Clarksdale President-Elect
JAY A. TRAVIS III of Jackson Second Vice-President
GEORGE VAN ZANT of Jackson Executive Director and
Secretary-Treasurer

COMMISSIONERS

O. R. SMITH, JR.	Corinth	JAMES C. PITTMAN	Hattiesburg
CONO A. CARANNA II	Biloxi	GEORGE WILLIAMSON	Mendenhall
ARMIS HAWKINS	Houston	J. HAROLD GRAHAM, JR.	Crystal Springs
NORMAN C. BREWER	Greenwood	DONALD G. KRUGER	Prentiss
JAMES MAYO	Louisville	DEWITT T. HICKS, JR.	Columbus
E. C. WARD	Natchez	D. BRIGGS SMITH, JR.	Batesville
CRYMES G. PITTMAN	Jackson	C. DENTON GIBBES, JR.	Laurel
W. H. JOHNSON, JR.	Decatur	W. ROBERTS WILSON, JR.	Pascagoula
LUCIUS DABNEY, JR.	Vicksburg		
J. LES PRITCHARD	Meridian	CARL ROBERT MONTGOMERY ...	Canton
ALFRED A. LIVINGSTON	Cleveland		

MEMBERS OF THE LAW SCHOOL LIAISON AND EDUCATION COMMITTEE

LOWELL E. GRISHAM, *Chairman*
Oxford

ROLAND D. MARBLE, *Vice-Chairman*
Jackson

WALTER W. EPPES, JR.
Meridian

LESTER F. SUMNERS
New Albany

HARVEY HENDERSON
Sumner

SECURITY INTERESTS IN FIXTURES UNDER MISSISSIPPI'S UNIFORM COMMERCIAL CODE

*Daniel Fenton Adams**

TABLE OF CONTENTS

I.	THE 1962 OFFICIAL TEXT	835
A.	<i>The Meaning of "Fixtures"</i>	836
B.	<i>The Priority Rules</i>	841
1.	The First Priority Rule	841
2.	The Second Priority Rule	844
3.	The Third Priority Rule	846
4.	Exceptional Priority Rules	847
a.	<i>Subsequent Purchasers</i>	847
b.	<i>Subsequent Lien Creditors</i>	849
c.	<i>Prior Encumbrancers Making Subsequent Advances</i>	851
C.	<i>The Removability Rule</i>	855
D.	<i>Perfection Rules</i>	856
1.	What to File	857
2.	Where to File	858
3.	The Secured Party's Dilemma	858
E.	<i>Some Loose Ends</i>	861
1.	Combined Mortgages	861
2.	Tenants' "Fixtures"	863
3.	Contractors' "Fixtures"	866
4.	Inconsistency Between Sections 9-313 and 9-312	867
5.	The Threat of <i>Moore v. Bay</i>	868
6.	The Problem of "Waste"	869
II.	MISSISSIPPI'S UNIFORM COMMERCIAL CODE	869
A.	<i>Perfection Rules</i>	870
1.	Form of Financing Statement	870
2.	Instructions to Filing Officers	872
3.	Goods Becoming Fixtures After Security Interest Attaches	873
4.	Perfection "Against the Real Estate"	875
5.	Utilities' Fixtures	878
B.	<i>Priority Rules</i>	879
1.	Security Interests Attaching to Goods Before They Become Fixtures	879

* Professor of Law, University of Mississippi (presently Visiting Professor of Law, Stetson University School of Law); A.B., 1947 Dickinson College; LL.B., 1949; J.D., 1968, Dickinson School of Law.

2.	Subsequently Arising Real Estate Interests . . .	883
3.	The Exceptional Rules	884
a.	<i>"Perfected Against the Real Estate" and "Actual Notice"</i>	884
b.	<i>Shift from Conjunctive to Disjunctive in 9-313(4A)</i>	885
c.	<i>Purchase at Foreclosure Sale as "Pur- chase"</i>	888
C.	<i>The Removability Rule</i>	888
D.	<i>The Meaning of "Fixtures"</i>	891
1.	Significance of the Question	891
2.	Answering the Question	894
III.	THE 1972 OFFICIAL TEXT	897
A.	<i>The Meaning of "Fixtures"</i>	898
B.	<i>The Removability Rule</i>	900
C.	<i>The Priority Rules</i>	901
1.	The "First-to-File" Rule	901
a.	<i>Perfection of the Security Interest</i>	901
b.	<i>"Fixture Filing"</i>	901
2.	Purchase Money Security Interests	904
3.	Construction Mortgagees: An Exception to an Exception	908
4.	Readily Removable Fixtures	910
5.	Lien Creditors	913
6.	Tenants' "Fixtures"	915
7.	Subordination Agreements	915
D.	<i>The Perfection Rules</i>	916
1.	Where to File—The General Rule	917
2.	Where to File—Transmitting Utilities' Fix- tures	917
3.	What to File—The General Rules	918
4.	What to File—Transmitting Utilities	919
5.	What to File—Combined Mortgages	920
6.	Duration of Effectiveness of Filing	921
E.	<i>Some Loose Ends</i>	922
1.	Goods Becoming Fixtures After Nonfixture Filing	922
2.	Mortgages Securing Future Advances	924
3.	The Problem of "Waste"	926
F.	<i>Summation</i>	927
IV.	CONCLUSION: EFFECT OF ADOPTING THE 1972 OFFICIAL TEXT IN MISSISSIPPI	927
A.	<i>Perfection Rules</i>	928
B.	<i>Priority Rules</i>	931
1.	Purchase Money Security Interests	931

2.	Non-Purchase Money Security Interests vs. Preexisting Real Estate Interests	933
3.	Security Interest vs. Subsequently Arising Real Estate Interests	933
a.	<i>Subsequent Purchasers</i>	933
b.	<i>Subsequent Lien Creditors</i>	934
c.	<i>Subsequent Advances Under Prior Encumbrances</i>	935
4.	Readily Removable Fixtures	937
5.	Tenants' "Fixtures"	938
6.	Summation	938
C.	<i>The Removability Rule</i>	939
D.	<i>The Meaning of "Fixtures"</i>	940
E.	<i>Summation</i>	941

Article 9 of the Uniform Commercial Code is concerned primarily with security interests in personal property. Security arrangements in which real estate serves as the collateral are generally excluded from its coverage. Article 9 does, however, deal in some detail with security interest in "fixtures"—tangible personal property which becomes so closely associated with land as to take on, at least for some legal purposes, the character of real property.

The treatment of fixtures in the 1962 Official Text¹—the text on which most state² enactments of the UCC have been based—has pro-

¹ The term "Official Text" refers to a text approved by the Code's sponsoring organizations, the National Conference of Commissioners on Uniform State Laws and the American Law Institute.

There have been a series of Official Texts, reflecting periodic "official" amendments. Most of the jurisdictions enacting the Code have done so during the period when either the 1958 or the 1962 Official Text was the current "official" version. AMERICAN LAW INSTITUTE, NAT'L CONF. OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM COMMERCIAL CODE: 1958 OFFICIAL TEXT WITH COMMENTS; AMERICAN LAW INSTITUTE, NAT'L CONF. OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM COMMERCIAL CODE: 1962 OFFICIAL TEXT WITH COMMENTS [hereinafter cited as 1962 OFFICIAL TEXT WITH COMMENTS]. A few amendments to the 1962 Official Text were approved in 1966. PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, REPORT NO. 3 (1967). The 1958 and 1962 Official Texts did not differ significantly in their treatment of fixtures, and the 1966 amendments did not change those provisions. Therefore, the term "1962 Official Text" will be used in this paper to refer to all Official Texts on which the original enactments of the Uniform Commercial Code have been based in the great majority of states.

² Forty-nine states have adopted the Uniform Commercial Code. *Alabama*: ALA. CODE tit. 7A, §§ 1-101 *et seq.* (1958); *Alaska*: ALASKA STAT. §§ 45.05.002 *et seq.* (1962); *Arizona*: ARIZ. REV. STAT. ANN. §§ 44-2201 *et seq.* (1967); *Arkansas*: ARK. STAT. ANN. §§ 85-1-191 *et seq.* (1961); *California*: CAL. COMM. CODE §§ 1101 *et seq.* (West 1964); *Colorado*: COLO. REV. STAT. ANN. §§ 155-1-101 *et seq.* (1963); *Connecticut*: CONN. GEN. STAT. ANN. §§ 42a-1-101 *et seq.* (1958); *Delaware*: DEL. CODE ANN. tit. 5A, §§ 1-101 *et seq.* (1975); *Florida*: FLA. STAT. ANN. §§ 671.1-101 *et seq.* (1966); *Georgia*: GA. CODE ANN. §§

voked much criticism.³ A large number of states,⁴ including Mississippi,⁵ have departed from its language. In 1971, the sponsors of the Code approved⁶ substantial changes in Article 9's fixture-related provisions.⁷

109A-1-101 *et seq.* (1973); *Hawaii*: HAWAII REV. STAT. §§ 490:1-101 *et seq.* (1968); *Idaho*: IDAHO CODE §§ 28-1-101 *et seq.* (1967); *Illinois*: ILL. ANN. STAT. ch. 26, §§ 1-101 *et seq.* (Smith-Hurd 1963); *Indiana*: IND. ANN. STAT. §§ 26-1-101 *et seq.* (Burns 1974); *Iowa*: IOWA CODE ANN. §§ 554.1101 *et seq.* (1967); *Kansas*: KAN. STAT. ANN. §§ 84-1-101 *et seq.* (1965); *Kentucky*: KY. REV. STAT. ANN. §§ 355.1-101 *et seq.* (Baldwin 1969); *Maine*: ME. REV. STAT. ANN. tit. 11, §§ 1-101 *et seq.* (1964); *Maryland*: MD. COMM. LAW CODE ANN. §§ 1-101 *et seq.* (1975); *Massachusetts*: MASS. GEN. LAWS ANN. ch. 106, §§ 1-101 *et seq.* (1958); *Michigan*: MICH. COMP. LAWS ANN. §§ 440.1101 *et seq.* (1967); *Minnesota*: MINN. STAT. ANN. §§ 336.1-101 *et seq.* (1966); *Mississippi*: MISS. CODE ANN. §§ 75-1-101 *et seq.* (1972); *Missouri*: MO. ANN. STAT. §§ 400.1-101 *et seq.* (1959); *Montana*: MONT. REV. CODES ANN. §§ 87A-1-101 *et seq.* (1947); *Nebraska*: NEB. REV. STAT. §§ 1-101 *et seq.* (1973); *Nevada*: NEV. REV. STAT. §§ 104.1101 *et seq.* (1973); *New Hampshire*: N.H. REV. STAT. ANN. §§ 382-A:1-101 *et seq.* (1961); *New Jersey*: N.J. STAT. ANN. §§ 12A:1-101 *et seq.* (1962); *New Mexico*: N.M. STAT. ANN. §§ 50A-1-101 *et seq.* (1953); *New York*: N.Y. U.C.C. §§ 1-101 *et seq.* (McKinney 1965); *North Carolina*: N.C. GEN. STAT. §§ 25-1-101 *et seq.* (1965); *North Dakota*: N.D. CENT. CODE §§ 31-01-01 *et seq.* (1968); *Ohio*: OHIO REV. CODE ANN. §§ 1301.01 *et seq.* (Page 1962); *Oklahoma*: OKLA. STAT. ANN. tit. 12A §§ 1-101 *et seq.* (1963); *Oregon*: ORE. REV. STAT. §§ 71.1010 *et seq.* (1973); *Pennsylvania*: PA. STAT. ANN. tit. 12A, §§ 1-101 *et seq.* (1970); *Rhode Island*: R.I. GEN. LAWS ANN. §§ 6A-1-101 *et seq.* (1969); *South Carolina*: S.C. CODE ANN. §§ 10.1-101 *et seq.* (1962); *South Dakota*: S.D. COMPILED LAWS ANN. §§ 57-1-1 *et seq.* (1967); *Tennessee*: TENN. CODE ANN. §§ 47-1-101 *et seq.* (1964); *Texas*: TEX. BUS. & COM. CODE §§ 1.101 *et seq.* (1968); *Utah*: UTAH CODE ANN. §§ 70A-1-101 *et seq.* (1953); *Vermont*: VT. STAT. ANN. tit. 9A, §§ 1-101 *et seq.* (1966); *Virginia*: VA. CODE ANN. §§ 8.1-101 *et seq.* (1965); *Washington*: WASH. REV. CODE ANN. §§ 62A.1-101 *et seq.* (1962); *West Virginia*: W. VA. CODE ANN. §§ 46-1-101 *et seq.* (1966); *Wisconsin*: WIS. STAT. ANN. §§ 401.101 *et seq.* (1964); *Wyoming*: WYO. STAT. ANN. §§ 34:1-101 *et seq.* (Supp. 1975). Louisiana is the sole exception. 1 UNIFORM LAWS ANN., Master Ed. 5 (Supp. 1975). Louisiana has adopted the bulk of Articles 1,3,4, and 5 as Title 10, COMM. LAWS OF LA. REV. STAT. chap. 1,3,4, and 5, effective Jan. 1, 1975, *id.*; but it has not adopted Article 9, the principal topic of this paper. The Code has also been adopted by Congress as the local law of the District of Columbia, D.C. CODE ENCYCL. ANN. §§ 28:1-101 *et seq.* (1967), and has been enacted in the Virgin Islands. V.I. CODE ANN. tit. 11A, §§ 1-101 *et seq.* (1965); 1 UNIFORM LAWS ANN., Master Ed. 5 (Supp. 1975). For convenience, this article will employ the term "States" as including the District of Columbia and the Virgin Islands.

³ See Hawkland, *The Proposed Amendments to Article 9 of the U.C.C.—Part 3: Fixtures*, 77 COM. L.J. 43, 43-46 (1972).

⁴ Of the 51 jurisdictions adopting Article 9 of the UCC, 36 have departed from the 1962 Official Text treatment of fixtures. For individual state variations from the Official Text, see 3 UNIFORM LAWS ANN., Master Ed. 8, *et seq.* (Supp. 1975); 1 UCC REP. SERV., at State Correlation Tables (1965); 6A BENDERS UCC SERV. 1.772.5, -778.4 (1975).

⁵ Mississippi enacted the UCC in 1966, to take effect March 31, 1968. Gen. Laws Miss. [1966], ch. 316. This version of the UCC is codified at Miss. CODE ANN. §§ 75-1-101 *et seq.* (1972). Mississippi's UCC differs from the 1962 Official Text, with reference to fixtures, in 5 sections (9-110, 9-313, 9-401, 9-402, and 9-403). These variations will be discussed in detail in part II of this article.

⁶ AMERICAN LAW INSTITUTE, NAT'L CONF. OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM COMMERCIAL CODE: 1972 OFFICIAL TEXT WITH COMMENTS OF ARTICLE 9 SECURED

These changes, embodied in the 1972 Official Text,⁸ have been adopted in a sizeable minority of American jurisdictions.⁹

This article compares Mississippi's treatment of security interests in fixtures with both the 1962 and the 1972 Official Texts in the hope that the comparison will highlight the desirability of amending the Mississippi Code.

I. THE 1962 OFFICIAL TEXT

For the most part, the UCC leaves the subject of real estate security interests to other law. Fixtures, however, present a unique problem because they represent a point of intersection between the law of personal and real property. A security interest may be created in goods¹⁰ while they are unquestionably purely personal property. Thereafter, the goods may become so closely related to land as to be treated as part of it, at least for some legal purposes. What happens to the security interest created when the goods had no real property characteristics? If it survives, how does it rank in relation to other interests in the same goods, some of which may attach to the goods because they have taken on the character of realty? Even after the goods have been so affixed to

TRANSACTIONS, viii [hereinafter cited as 1972 OFFICIAL TEXT WITH COMMENTS].

⁷ Article 9 was also revised in 1971 in many respects having no direct bearing on fixtures. See 1972 OFFICIAL TEXT WITH COMMENTS, App. 743 *et seq.*; REVIEW COMMITTEE FOR ARTICLE 9 OF THE UNIFORM COMMERCIAL CODE, PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, FINAL REPORT (1971) [hereinafter cited as REVIEW COMMITTEE FINAL REPORT]. A survey of the changes relating to conflict of laws, with special attention to their impact on Mississippi law if adopted, appears in Adams, *The 1972 Official Text of the Uniform Commercial Code: Analysis of Conflict of Laws Provisions*, 45 Miss. L.J. 281 (1974).

⁸ The wording of a few sections in articles other than Article 9 (sections 1-105, 1-201, 2-107, and 5-116) of the 1972 Official Text differ from their wording in the 1962 Official Text and its 1966 amendments. Compare 1972 OFFICIAL TEXT WITH COMMENTS §§ 1-105, -201, 2-107, 5-116, with 1962 OFFICIAL TEXT WITH COMMENTS §§ 1-105, -201, 2-107, 5-116.

⁹ As of the close of 1975 legislative sessions, fourteen states had adopted some or all of the amendments to the 1972 Official Text: Arizona, Arkansas, California, Illinois, Iowa, Kansas, Nevada, North Carolina, North Dakota, Oregon, Texas, Virginia, West Virginia, and Wisconsin. 1 UCC REP. SERV. App., Article 9, at 2 (1975).

¹⁰ The term "goods" is used in this article to refer to tangible property which was originally personal property and which may or may not have acquired a real property status by close association with land. This usage may not be congenial to those readers who think of "goods" as purely personal property. It is, however, in accord with UCC usage. Section 9-105(1)(f) of the 1962 Official Text provides that the term "goods", for purposes of Article 9,

includes all things which are moveable at the time the security interest attaches or which are fixtures (section 9-313), but does not include money, documents, instruments, accounts . . . contract rights and other things in action.

1962 OFFICIAL TEXT WITH COMMENTS § 9-105(1)(f) (emphasis added).

land as to be treated as part of it, they may still be thought of as having a hybrid status. This creates the possibility of their continued treatment as personalty for some purposes, thus permitting personal property security interests to be created in them. As a result, serious questions of priority between personal property security interests and real estate interests arise. The Code, principally in section 9-313, undertakes to resolve such problems.

A. *The Meaning of "Fixtures"*

Though replete with other definitions, the UCC leaves the meaning of the term "fixtures" largely to other law. The statute does, however, provide that there can be no Article 9 (*i.e.*, chattel) security interest in "goods incorporated into a structure in the manner of lumber, bricks, tile, cement, glass, metal work and the like," unless the whole "structure remains personal property under applicable law," and that the "law of this state other than this Act determines whether and when other goods become fixtures."¹¹

As a whole, however, section 9-313 provides more insight to the meaning of "fixtures" than is apparent on first reading. The Code envisions a three-way classification of property: (1) former chattels which have become so closely associated with realty as to become real property for all legal purposes ("pure realty"); (2) chattels which remain personal property for all legal purposes, even though they may have some association with particular real estate ("pure personalty"); and (3) chattels which, by reason of having become associated with realty, have taken on the character of real property for some legal purposes but which retain sufficient character as personal property to remain or become subject to chattel (*i.e.*, Article 9) security interests ("hybrid" or "mixed" property).¹²

There can be no Article 9 security interest in goods of the first class; hence, irrespective of whether such goods are characterized as "fixtures," the Article 9 rules relating to security interests in fixtures are irrelevant. There can be no interests arising under real estate law in

¹¹ 1962 OFFICIAL TEXT WITH COMMENTS § 9-313(1).

¹² Professor Gilmore's interpretation of section 9-313 would recognize only two classes of property, real and personal. 2 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 30.3, at 812-14 (1965) [hereinafter cited as GILMORE]. Most commentators conclude that a three-way classification is contemplated. See, *e.g.*, 1A P. COOGAN, W. HOGAN & J. VAGTS, SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE §§ 16.09, 17.09, at 1808-09 (1964) [hereinafter cited as COOGAN, HOGAN & VAGTS]; J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 25-8 (1972); Hawkland, *supra* note 3, at 44-45; Kripke, *Fixtures Under the Uniform Commercial Code*, 64 COLUM. L. REV. 44, 49-50, 62-64 (1964).

goods of the second class. Consequently, there is no need for rules governing conflicts between Article 9 security interests in such goods and interests arising under real estate law. They are not "fixtures" as the Code employs the term, and any rules relating to security interests in fixtures are again irrelevant. It is goods of the third class, the hybrids, that can be subject to conflicting chattel security interests and interests arising under real estate law. These are the "fixtures" to which the rules of Article 9 apply.

The Code somewhat imprecisely defines the first of these classes, "pure realty," as goods which fall within the first sentence of section 9-313(1). Given a "structure"¹³ which is not, as a whole, personal property, the problem is to determine whether the goods have been "incorporated" into it "in the manner of" the various building materials listed. If the goods have been so "incorporated," then they are "pure realty" under section 9-313(1). Thus, "pure realty" certainly includes building materials, such as cement used in the concrete for a foundation wall, so incorporated as to lose their separate identity. It would also probably include goods which, while separately identifiable, could not be taken away without virtually destroying the structure. Exemplary of this category are nails used to fasten together the wooden framework of a house or the structural members themselves.¹⁴ The outer limits of the category, however, remain somewhat uncertain.¹⁵

¹³ The term "structure" would surely include a building, although it is not clear what else. See 1A COOGAN, HOGAN & VAGTS § 17.09, at 1811 n.40.

¹⁴ See Kripke, *supra* note 12, at 49.

¹⁵ Perhaps no more specific statement can be made than that the category includes all items built into a structure which can fairly be regarded as necessary to make it a "structure," as distinguished from accessories, decorations and equipment.

It has been suggested that precise legal delineation of the outer limits of the "goods-incorporated-into-a-structure" category is unnecessary in view of the rule of subsection (5) of section 9-313. See Hawkland, *supra* note 3, at 45. That subsection provides that when a secured party has priority as to property of the third, or hybrid, class—"fixtures"—over all persons having interests in the real estate, he may, upon the debtor's default, remove his collateral from the real estate. He must, however, reimburse encumbrancers and owners of the realty, other than the debtor, for the cost of repair of any physical injury to the real estate caused by the removal. The secured party must also, of course, bear the expense of removal. That expense, plus the liability for physical damage to the real estate, will deter removal of any goods whose value when removed would not exceed those costs. It has been urged, therefore, that there is little danger to real estate interests in the vagueness of the dividing line between pure realty and hybrid property, because the practical considerations affecting the secured party's decision to invoke his right of removal will prevent removal of most goods whose legal classification is doubtful.

Professor Hawkland has explained the interrelation between subsections (1) and (5) of section 9-313 as follows:

While this class is difficult to define metaphysically, the draftsmen thought that

The principal problem left by the Code to other law is the drawing of the distinction between pure personalty and hybrid property. Even this problem is partially solved by section 9-313 which implies that any goods which are not pure realty under the first sentence of subsection (1) can be subject to a chattel security interest.¹⁶ All that remains to be determined by resort to non-Code law is whether the goods in question have acquired a sufficient real property character to be subject to interests in the land with which the goods have become associated.

If the relevant pre-Code law employed the term "fixtures" in a different sense than the UCC, confusion may result. Some pre-Code cases and statutes, unlike the Code, did not recognize a tripartite division of property. In these states, the term "fixtures" applied to goods which had once been personal property but which had become real property upon affixation to land.¹⁷ This classification made it conceptually impossible for any interest of a personal property character to coexist with real property interests in the same goods. If a suit arose between a person claiming a chattel interest in goods¹⁸ and a person claiming a real estate interest in the goods,¹⁹ the critical question was

they could do it economically by stating that any chattel, except those falling clearly in [the class of "goods incorporated into a structure . . ."], could be removed by the conditional seller regardless of material injury to the real estate, if the fixture financier would reimburse the real estate claimant, other than the debtor, for the damage to the real property caused by the removal. Bricks incorporated into a building could not be removed under any circumstance . . . but what about an air conditioner or a furnace? It was thought that considerations of economics would prevent a conditional seller from effecting removal if these items were so much a part of the building that the physical damage to the structure would offset the gain of removal. On the other hand, if this economic situation did not deter removal, that was proof positive that an item was really a fixture that could be taken, with reimbursement for physical damage to the real property, by the chattel financier against non-protected realty interests.

Id.

¹⁶ See 1A COOGAN, HOGAN & VAGTS § 17.09, at 1811 n.40; Hawkland, *supra* note 3, at 44-45; Kripke, *supra* note 12, at 50. The requirements for the creation of such an interest are prescribed elsewhere in Article 9.

¹⁷ One of the leading American cases on the law of fixtures, *Teaff v. Hewitt*, 1 Ohio St. 511 (1853), declared that

A removable fixture as a term of general application, is a solecism—a contradiction in words. . . .

. . . A fixture is an article which was a chattel, but which by being physically annexed or affixed to the realty, became accessory to it and part and parcel of it.

Id. at 525, 527.

¹⁸ An example of such a person would be a chattel mortgagee or a seller of goods under a conditional sales contract.

¹⁹ For example, a holder of a mortgage on land with which the goods have become associated who contends that the goods have become subject to the mortgage by accession.

likely to be whether the goods had become "fixtures." If so, there could be no chattel interest in the goods since they were no longer personal property; by the same token, the validity of the real property claim was established. Conversely, if the goods were found not to be "fixtures," there could be no real property interest in them and the validity of the chattel interest was established. While the results of pre-Code cases employing this concept of "fixtures" might often be the same as those the Code would produce, they were reached by subtle, and often confusing, factual distinctions drawn in deciding whether goods had become "fixtures." Decisions under the Code, however, must recognize the possibility of conflicting real and personal property interests in the same goods and resolve the conflicts by rules of priority.²⁰

It follows that pre-Code cases employing this older concept of "fixtures" cannot be used to determine whether goods are "fixtures" under the Code by simply comparing their facts with the case at hand, noting whether the goods in the prior case were held to be fixtures, and following their rationale as to the factual determinants of the classification. They must be used, instead, to determine whether the goods acquired a sufficient connection with the land so as to become subject to the interests of those who already had or subsequently acquired interests in the land. Since the question of whether a chattel security claimant should prevail over a claimant basing his claim on an interest in the land to which the goods have been affixed is now answered by the Code, the cases of greatest precedentiary value answer this hypothetical question: If there were no Article 9 security interest in the goods, would the real estate claimant have an interest in the goods?

To illustrate, suppose *A* owns a dwelling house in which he installs a furnace purchased from *B* under an agreement which provides that *B* will retain a security interest in the furnace until *A* has paid the full purchase price. *A* then conveys the house and lot to *C* by a deed which describes the land conveyed by metes and bounds but makes no mention of the furnace. *A* defaults on his contract with *B* and *B* seeks to remove the furnace from the dwelling. *C* resists the removal, contending that *A*'s conveyance to him passed title to the furnace along with the house and lot as part of the realty.

In determining whether *B* or *C* should prevail under the UCC, the first question is whether the furnace became pure realty upon installation as "goods incorporated into a structure" under the first sentence of section 9-313. Presumably, the answer would be "no." *B* could, therefore, have a valid Article 9 security interest in the furnace. Next we need

²⁰ See 5 AMERICAN LAW OF PROPERTY § 19.12, at 52-55 (A. Casner ed. 1952) [hereinafter cited as AM. LAW PROP.].

to determine whether *B* acquired a valid and enforceable security interest in the furnace under the rules of Article 9. Assuming an affirmative answer, the next question is whether the furnace remained pure personalty so that *C* could have no interest in it by virtue of his real estate conveyance or whether it became a "fixture" in which *C* acquired an interest by virtue of his deed to the land. Assuming there is no other relevant statute or Code case law, the answer should be sought from pre-Code cases which indicate whether, as between *A* and *C*, *A*'s deed passed an interest in the furnace to *C*. This indication can come only from cases ruling on when goods affixed to land by the owner of both become "fixtures" in the sense that they will pass from the grantor to the grantee by a conveyance of the land.²¹

Even more difficult to resolve by resort to non-Code case law is whether goods incorporated into a structure become pure realty when the structure itself "remains," under 9-313(1), "personal property under applicable law." First, the term "personal property" as used in section 9-313(1) needs interpretation. Does it refer to pure personal property or does it include property of the hybrid type? Since the sentence apparently is designed to indicate when goods built into a structure become so "affixed" that a security interest in them can be created only under the non-Code law of real property, it follows that the rule applies only to goods incorporated into a structure which is itself purely real property.²² Once again reference to pre-Code law may not be very helpful. If the applicable pre-Code law recognized only two classes of property, real and personal, it may be useful in classifying the structure as pure personalty or as having some real property character. It will not, however, provide guidance as to the distinction between a structure which is pure realty and one having both real and personal property characteristics.

As a practical matter, the conceptual difficulty probably will not be a great problem. Common understanding and business practice treat most "structures," such as dwelling houses, apartment complexes, fac-

²¹ Cases involving contests between conditional sellers of goods which are affixed to land and subsequent grantees of the land should not be controlling. Their employment of the "fixtures" device to resolve the ultimate question of whether the conditional seller or the real estate grantee should prevail may be misleading. Under the Code, if we decide that *C* did acquire an interest in the furnace through his deed from *A*, the priority rules of section 9-313 will come into play to determine whether *B* or *C* should prevail.

²² See 1A COOGAN, HOGAN & VAGTS § 17.09, at 1810 n.38. If the structure remains purely personal property, the priority rules of section 9-313 will not apply to it or its components. If the structure is property of the "hybrid" type, the priority rules of section 9-313 will apply to conflicts between Code security interests and real property interests in the structure. An attempt to create or retain a security interest in component parts of such a structure, rather than the structure as a whole, could produce difficult problems. Compare 1962 OFFICIAL TEXT WITH COMMENTS § 9-313, with *id.* § 9-314, and *id.* § 9-315.

tories, and stores, as "pure" real estate. Attempts to create security interests in such structures apart from the land on which they are located are unlikely, and attempts to create security interests in particular building components of such structures are even less likely. There are, however, possibilities of litigation over the status of mobile homes and prefabricated buildings, and it appears that some state courts are being called upon to make new law to resolve these cases.²³

B. *The Priority Rules*

Assuming that the goods have been found to be "fixtures" under the Code, and that both an Article 9 security interest in them and a conflicting interest arising under real estate law exist, section 9-313 provides three general rules of priority, qualified by several exceptions, to resolve the conflict.

1. The First Priority Rule

The first and probably most significant rule is that an Article 9 security interest which attaches²⁴ to goods before they become fixtures

²³ For a discussion of problems of this sort, see R. HENSON, *HANDBOOK ON SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE* § 8-4 (1973) [hereinafter cited as HENSON]; Gilbert, *Observations On UCC Article 9: Mississippi's First Five Years*, 44 Miss. L.J. 208, 222-25 (1973).

²⁴ "Attach" is an important term of art in the UCC. It refers to the time a security interest in particular collateral arises in favor of a secured party. The 1962 OFFICIAL TEXT WITH COMMENTS § 9-204(1) indicates that before a security interest can "attach": (1) an agreement must have been made between the debtor and the secured party that the latter shall have a security interest in the collateral in question; (2) value must have been given by the secured party; and (3) the debtor must have acquired rights in the collateral. The security interest will "attach" without regard to the order of occurrence, unless the parties have agreed to postpone the time of attachment. Though not technically necessary for "attachment" of the security interest, compliance with the Statute of Frauds provision of section 9-203(1) is necessary to make the security interest "enforceable" against either the debtor or third parties. The collateral must either be in the possession of the secured party, or the debtor must have signed a security agreement which describes the collateral and, if the collateral includes crops, oil, gas, or minerals to be extracted, or timber to be cut, also describes the land concerned. Since it rarely would be practicable for the secured party to have possession of fixtures collateral prior to the debtor's default, a written security agreement will almost always be necessary to make a security interest enforceable. 1A COOGAN, HOGAN & VAGTS § 17.02[2], at 1786-87 n.11.

In any discussion of UCC security interests in fixtures, the term "attach" is potentially confusing because it may be used in two senses. A security interest "attaches" to collateral when the requirements of section 9-204(1) are satisfied. That may be before or after the collateral, if goods, become fixtures. But whether or not goods become fixtures depends on their being brought into association with land in a special way, and legal discussions of fixture law often refer to the type of association involved, or at least an element of it, as the "affixation" or "annexation" or "attachment" of the goods to the

generally has priority over all preexisting interests in the real estate. This rule is found in subsection (2):

[A] security interest which attaches to goods before they become fixtures takes priority as to the goods over the claims of all persons who have an interest in the real estate except as stated in subsection (4).²⁵

Subsection (4) protects certain persons subsequently acquiring or enlarging interests in the real estate and leaves all other preexisting interests to be governed by subsection (2). While it is uncertain what real estate interests are to be considered as preexisting for the purpose of this rule, it is clear that an Article 9 security interest will take priority over nearly all interests in the real estate which predate both the time the security interest attaches to the goods and the time the goods become fixtures.

The principal type of case the draftsmen appear to have had in mind was one where goods are delivered to a landowner under a conditional sales contract, by the terms of which the seller formally reserves title to the goods until the full purchase price has been paid; the goods are installed on land so as to become fixtures; and the land is already subject to a real estate mortgage. Although pre-Code cases conflicted over whether the conditional seller or the mortgagee had the better right to the goods, the majority view,²⁶ reflected in the Uniform Conditional Sales Act,²⁷ favored the conditional seller. The Code continues this view.²⁸

land. To minimize the potential for confusion of these two quite different uses of the word "attach," this article will employ it only in the sense in which it is defined in section 9-204(1).

²⁵ 1962 OFFICIAL TEXT WITH COMMENTS § 9-313(2).

²⁶ See 2 GILMORE § 28.4, at 758-59; Kripke, *supra* note 12, at 50.

²⁷ 2 GILMORE §§ 28.5, .7; Hawkland, *supra* note 3, at 43-44; Kripke, *supra* note 12, at 50.

²⁸ An arguable policy justification for preferring the conditional seller is that since the improvement of the land has been made at his expense, he has a strong equitable claim to the improvements if he is not paid. Shanker, *An Integrated Financing System for Purchase Money Collateral: A Proposed Solution to the Fixture Problem Under Section 9-313 of the Uniform Commercial Code*, 73 YALE L.J. 788, 791 (1964). Professor Gilmore has traced in detail the pre-Code preference for conditional sellers and others taking interests in goods to secure their purchase price. Gilmore, *The Purchase Money Priority*, 76 HARV. L. REV. 1333 (1963). The prior mortgagee of the land, on the other hand, would receive an unbargained-for windfall and would be unjustly enriched at the conditional seller's expense if he could defeat the conditional seller's claim. 1A COOGAN, HOGAN & VAGTS § 16.10, at 1724-25; Hawkland, *supra* note 3, at 44; Kripke, *supra* note 12, at 50. The requirement of section 9-313(5), that the seller pay for all physical damage to the realty caused by his removal of the collateral, assures the mortgagee that he will not be left with less security than he had before the goods were affixed to the land. See 1962 OFFICIAL TEXT WITH COMMENTS § 9-313, Comment 5; 1A COOGAN, HOGAN & VAGTS § 16.09,

Though subsection (2) may have been aimed at such a "typical case," its language is of broader scope. Priority is granted, not specifically to conditional sellers, but to any "security interest which attaches to goods before they become fixtures." The priority is effective not merely against holders of prior real estate mortgages, but "over the claims of all persons who have an interest in the real estate," except those protected by subsection (4). Most of the arguments for giving a conditional seller priority over an earlier mortgage seem to justify priority over other preexisting real estate interests as well.²⁹

The broad characterization of persons entitled to priority can be explained partially by the Code's deemphasis of form in the creation of security interests.³⁰ Under the Code, it is possible for a seller of goods

at 1710-13; Shanker, *supra*, at 791. While the statute does not require the conditional seller to file or otherwise give notice of his security interest to the mortgagee, no such notice is needed since the mortgage debt was created prior to the conditional sale, or at least prior to the time the goods became fixtures. The mortgagee, therefore, is not likely to have been relying on the goods as security when he extended credit to the mortgagor. Hawkland, *supra*, at 44; Kripke, *supra*, at 50; see 1A COOGAN, HOGAN & VAGTS § 16.08[4]. While a prior mortgagee making an additional advance to the debtor after the debtor acquires the goods involves possible deception of the mortgagee, it is specially dealt with in the 1962 OFFICIAL TEXT WITH COMMENTS § 9-313(4).

It is argued further that preferring the real estate mortgagee would tend to discourage the improvement of real estate by deterring suppliers of goods which are to become fixtures from selling them on credit. The consequences would not only be socially undesirable, but actually disadvantageous to real estate mortgagees because it would hamper their mortgagors' efforts to make the most productive use of their lands. See HENSON, *supra* note 23, § 8-2; 5 AM. LAW PROP. § 19.12, at 47; Shanker, *supra*, at 792. While real estate mortgagees may counter that a rule favoring them would simply require their debtors to apply to them for additional credit or permission to obtain secured credit from chattel suppliers, there is no sound reason for granting one class of credit suppliers a veto power over their debtor's freedom to resort to other credit sources. See 1A COOGAN, HOGAN & VAGTS § 17.12[2], at 1828-29. It must be conceded that there are possibilities of prejudice to a prior real estate mortgagee even though he makes no advances after the debtor's acquisition of the fixtures. He may, for example, be induced to refrain from foreclosure of the mortgage after the debtor's default in the mistaken belief that his security is greater than it actually is. See *id.* § 17.05[2].

²⁹ See note 28 *supra*.

³⁰ Article 9 applies "to any transaction (regardless of its form) which is intended to create a security interest in personal property or fixtures. . . ." 1962 OFFICIAL TEXT WITH COMMENTS § 9-102(1)(a). "Security Interest" is defined as "an interest in personal property or fixtures which secures payment or performance of an obligation. . . ." *Id.* § 1-201(37). Section 9-102(2) emphasizes the unimportance of pre-Code forms by providing that:

This Article applies to security interests created by contract including pledge, assignment, chattel mortgage, chattel trust, trust deed, factor's lien, equipment trust, conditional sale, trust receipt, other lien or title retention contract and lease or consignment intended as security.

who wishes to retain a claim to the goods as security for the purchase price to accomplish that objective by several means, including: (1) using a conditional sales contract in traditional form; (2) taking a chattel mortgage from his buyer; or (3) using a contract in which he reserves, or is granted, a "security interest" in the goods to secure the purchase money obligation. It is also possible that the buyer will pay for the goods by borrowing cash from a bank or other source, to whom he grants a security interest in the goods. If the seller or lender ensures that his security interest "attaches" to the goods before they become fixtures, he will benefit from the first priority rule in all of these cases.

The key point in the secured party's favor in each of these cases is that the goods have been placed on the land at his expense. His equitable claim to the goods upon default underlies the argument for granting him priority over preexisting real estate interests. Suppose, however, that the owner of goods executes a chattel mortgage as security for a preexisting unsecured debt which arose from a transaction unrelated to his acquisition of the goods. Assume further that he then affixes the goods to his land so that they become fixtures. Section 9-313(2) would give the chattel mortgagee priority over all preexisting real estate interests. The reasons he should have such priority are, however, less evident than those favoring the party financing the debtor's acquisition of the goods.³¹ Perhaps the infrequency of such cases does not justify special statutory treatment, but it should be noted that an appropriate distinction could easily have been drawn by confining the priority of 9-313(2) to "purchase money" security interests.³²

2. The Second Priority Rule

Subsection (3) of section 9-313 deals with security interests attach-

Id. § 9-102(2). Many pre-Code distinctions between different forms of security arrangements are repudiated by the Article as unnecessary or even pernicious. *See id.* § 9-101, Comment.

³¹ 1A COOGAN, HOGAN & VAGTS § 17.12[1], at 1821-22; *see* 2 GILMORE § 30.6, at 821-22.

³² A "purchase money security interest" is defined as an interest

(a) taken or retained by the seller of the collateral to secure all or part of its price; or

(b) taken by a person who by making advances or incurring an obligation gives value to enable the debtor to acquire rights in or the use of collateral if such value is in fact so used.

1962 OFFICIAL TEXT WITH COMMENTS §9-107. A number of Code sections treat purchase money security interests more favorably than other security interests. *See, e.g., id.* §§ 9-301(2), 9-302(1)(c)-(d), 9-312(3)-(4). It would have been simple to state the priority rule of 9-313(2) as applicable to "purchase money security interests" and thus restrict it to where there was a fair consensus in pre-Code law that the chattel financier should prevail and as to which strong policy arguments for the preference could be made.

ing to goods after they have become fixtures and provides that such a security interest

is invalid against any person with an interest in the real estate at the time the security interest attaches to the goods who has not in writing consented to the security interest or disclaimed an interest in the goods as fixtures.³³

Thus, a security interest attaching to goods after they have become fixtures is subordinate to all antecedent real estate interests unless the holders of the real estate interests consent to the subordination of their interests.

This subsection recognizes the feasibility of creating Article 9 security interests in goods which are already fixtures. The wisdom, or at least the need, for doing so has been questioned³⁴ on two grounds: First, attempts to create chattel security interests in existing fixtures have rarely been encountered in pre-Code law. Second, the social utility of facilitating this kind of financing arrangement is doubtful. Inclusion of the subsection has been explained as a concession to Pennsylvania lawyers.³⁵ In Mississippi, attempts to create chattel security interests in goods which are already fixtures have resulted in four state supreme court cases.³⁶ Thus, section 9-313(3) does deal with a practical problem which arises at least occasionally.

The propriety of subordinating the security interest to preexisting real estate interests apparently remains unquestioned.³⁷ To do otherwise

³³ *Id.* § 913(3).

³⁴ 2 GILMORE § 30.3, at 810.

³⁵ Pennsylvania lawyers argued that the state's fixture law classified a great deal of machinery and other equipment as realty even though no reliance was actually placed on it in real estate financing. If such goods could be made collateral only under real estate mortgages, lenders on the security of such goods would often have to take second mortgages, which banks and insurance companies were prohibited from doing. If Article 9 security interests could be created in such goods, banks and insurance companies could engage in this type of chattel financing. *Id.* § 30.3, at 810 n.6, quoting Mr. Kripke.

³⁶ *Love v. Union Cent. Life Ins. Co.*, 168 Miss. 408, 150 So. 794 (1933); *Crumbley Grocery Co. v. Ferguson*, 159 Miss. 861, 132 So. 737 (1931); *American Laundry Mach. Co. v. Citizens' Nat'l Life Ins. Co.*, 107 Miss. 108, 65 So. 113 (1914); *Perkins, Livingston & Post v. Swank*, 43 Miss. 349 (1870).

³⁷ At times, there may be, however, a question of whether a case is governed by subsection (2) or subsection (3) of section 9-313. See *Karp Bros., Inc. v. West Ward S. & L. Ass'n*, 8 UCC REP. SERV. 257 (Pa. Sup. Ct. 1970), holding that where a secured transaction entered into before the collateral became fixtures was refinanced and a new security agreement made after the goods became fixtures, the case was governed by subsection (2). The original security interest was deemed to continue under the subsequent security agreement. See also *Honea v. Laco Auto Leasing, Inc.*, 454 P.2d 782, 6 UCC REP. SERV. 37 (N. Mex. Ct. App. 1969), holding that: (1) a purchase money security interest attaching to goods at the same time they became fixtures was not governed by 9-313(3) and had

would diminish the value of real estate interests already vested in the fixtures.³⁸ The Article 9 secured party, if he has not financed the debtor's acquisition of the goods, is in a poor position to claim a superior equity. In some pre-Code cases, however, the recipient of the chattel mortgage was the seller of the goods in question, and the chattel mortgage was given to secure the seller's right to the purchase price.³⁹ Although this type of chattel mortgagee might have a stronger equity, especially against real estate interests which arose before the goods became fixtures,⁴⁰ the Code creates no exception for such cases.⁴¹

3. The Third Priority Rule

As a general rule, an Article 9 security interest has priority over all real estate interests arising after it attaches, regardless of whether it attaches before or after the goods become fixtures. This rule is explicitly stated in subsection (3) with respect to security interests attaching to goods after they become fixtures. As to security interests attaching to goods before they become fixtures, the rule is implied by subsection (2), when read in conjunction with subsection (4), which makes exceptions for only limited classes of subsequently arising real estate interests.⁴²

priority over a preexisting real estate interest (presumably under subsection (2)); and (2) that this is true even though at the time the security interest attached it was unenforceable under 9-203(1) as a result of the lack of a written security agreement signed by the debtor until after the goods had become fixtures. *But see* State Bank v. Kahn, 58 Misc. 2d 655, 296 N.Y.S.2d 391, 6 UCC REP. SERV. 43 (N.Y. Sup. Ct. 1969).

³⁸ See 1962 OFFICIAL TEXT WITH COMMENTS § 9-313, Comment 4.

³⁹ See note 36 *supra*. In Perkins, Livingston & Post v. Swank, 43 Miss. 349 (1870), the chattel mortgagee lost to the real estate mortgagee. In American Laundry Mach. Co. v. Citizens' Nat'l Life Ins. Co., 107 Miss. 108, 65 So. 113 (1914), however, the chattel mortgagee prevailed.

⁴⁰ Arguably, if the seller of goods was careless enough to sell the goods originally on unsecured credit, taking a chattel mortgage for the price only after they had been installed as fixtures, his own laches is sufficient reason for denying the lien a preferred position. The law, however, is not always so unforgiving of negligence when it harms no one else. Payments made by mistake, for example, are generally recoverable to avoid unjust enrichment, even though the mistake would not have been made except for the payors' negligence. See RESTATEMENT OF RESTITUTION ch. 2, topic 2, title A, & § 59 (1937).

⁴¹ See 1A COOGAN, HOGAN & VAGTS § 17.05[3], pointing out that 9-313(3) prefers prior real estate interests even if they are unrecorded and suggesting that a recordation requirement would be desirable to protect Article 9 secured parties who check the records.

⁴² Although subsection (2) speaks in terms of "priority," while subsection (3) declares the security interest "valid" or "invalid" against various real estate interests, there is no difference in legal effect. Both subsections establish rules of priority. This is evident from the treatment of the security interest as "invalid" only against *some* rival claimants; in subsection (3) from the cross-reference in subsection (5) to subsection (3) as determining when a secured party has "priority"; and from the caption of section 9-313, "Priority of Security Interests in Fixtures." See 1962 OFFICIAL TEXT WITH COMMENTS § 1-109 (section captions are part of the Act).

The basis for the general priority over subsequently arising real estate interests appears to be the principle of "first-in-time, first-in-right." Indeed, the principle might be said to be the general priority rule of section 9-313, of which the more particular rules referred to above are all expressions. Such a characterization is possible, however, only if one remembers that the order in which interests attach to the fixtures dictates the priority in right.

4. Exceptional Priority Rules

The first and third priority rules are qualified by subsection (4) of section 9-313, which provides that the security interests dealt with in subsections (2) and (3) do not take priority over three classes of persons.

a. *Subsequent Purchasers*

Section 9-313(4)(a) gives preference to a "subsequent purchaser for value of any interest in the real estate . . . if the subsequent purchase is made . . . without knowledge of the security interest and before it is perfected."⁴³ The focus is on the classic type of person who may be unjustly injured by the "first-in-time, first-in-right" principle—a subsequent innocent purchaser for value. Code definitions, however, are important in appreciating the scope of the rule. "Purchaser" is broadly defined as anyone "taking by . . . any . . . voluntary transaction creating an interest in property."⁴⁴ This definition includes a mortgagee or other person taking a limited interest in the real estate as well as a buyer of the land. "Value" is also broadly defined: "[A] person gives 'value' for rights if he acquires them . . . [*inter alia*] as security for or in total or partial satisfaction of a preexisting claim."⁴⁵ A creditor taking a mortgage on real estate as security for a preexisting debt would thus qualify as a "purchaser for value," even though he makes no new advances nor otherwise substantially changes his position to his detriment.

The concept of innocence, as delineated by 9-313(4)(a), involves lack of knowledge of the security interest, as well as lack of constructive notice. The "purchase" must have been made without knowledge of the security interest and before the security interest was "perfected." Significantly, the first, second, and third priority rules operate without regard to whether the security interest is perfected. Only to gain priority over persons subsequently acquiring or enlarging interests in the real estate without knowledge of the security interest does the secured party need to perfect his interest.⁴⁶

⁴³ *Id.* § 9-313(4)(a).

⁴⁴ *Id.* § 1-201(32), (33).

⁴⁵ *Id.* § 1-201(44).

⁴⁶ Perfection of a security interest is achieved "when it has attached and when all the

The main interpretive problem posed by this section involves the time reference of the word "subsequent"; subsequent to what? Suppose, for example, that goods are conditionally sold to a buyer on Monday; a mortgage on land owned by the buyer is executed to a third person on Tuesday; and the buyer installs the goods on the land so that they become fixtures on Wednesday. The mortgagee "purchased" an interest in the land after the security interest attached to the goods but before they became fixtures. Is the mortgagee subordinated to the conditional seller under the first priority rule of 9-313(2), as the holder of a preexisting real estate interest? Or, rather, could he qualify as a "subsequent" innocent purchaser for value under 9-313(4)(a)? It has been argued that "subsequent" should be read as referring to the time the goods become fixtures. The purpose of subsection (4)(a) is to protect a purchaser from being prejudicially misled into parting with value by assuming that he will acquire an interest in fixtures on the land which is as free of prior encumbrances as is his interest in the land itself. Since he could not be so misled until the goods in question became fixtures, "subsequent" should be read as referring to the time the goods became fixtures.⁴⁷ The

applicable steps for perfection have been taken." *Id.* § 9-303(1). As a general rule, "a financing statement must be filed to perfect all security interests" *Id.* § 9-302(1). While there are exceptions to that general rule, none are likely to be applicable to a security interest in fixtures. One such exception is "a security interest in collateral in the possession of the secured party under section 9-305." *Id.* § 9-302(1)(a). Section 9-305 provides that, "a security interest in . . . goods . . . may be perfected by the secured party's taking possession of the collateral." It is possible to hypothesize a fact situation in which the secured party has possession of fixtures prior to the debtor's default, *see* 1A COOGAN, HOGAN & VAGTS § 17.02[2], at 1786-87 n.11, but the practical possibilities of perfection in this manner seem negligible.

Paragraphs (c) and (d) of section 9-302(1) also except purchase money security interests in low-priced farm equipment and consumer goods from the general filing requirement, "but filing is required for a fixture under section 9-313." It is clear from this language that filing is required for these security interests if they are fixtures and the secured party desires protection against those classes of real estate interests listed in section 9-313(4). It is not so clear, however, that filing is needed for perfection when the secured party seeks to establish priority over non-real estate interests under other sections of Article 9. The consensus appears to be that filing is necessary for perfection against anyone. *See, e.g., id.* § 17.12[2], at 1831 n.53; Kripke, *supra* note 12, at 54-55. *But see* 1A COOGAN, HOGAN & VAGTS § 17.02[2], at 1786-87 n.11.

If perfection of a security interest in fixtures has been achieved by such a filing and before someone "purchases" an interest in the real estate, the purchaser cannot claim protection from the security interest as an innocent purchaser for value under subsection 9-313(4)(a). He is, in effect, on notice of the security interest at the time of his purchase.

⁴⁷ 1A COOGAN, HOGAN & VAGTS § 17.04[1], at 1791-92 n.18. Professor Gilmore has argued that an absolute rule as to whether "subsequent" refers to the time of attachment of the security interest to the goods or to the time the goods became fixtures is undesirable. He points out that the landowner likely will have contracted to buy the goods in anticipation of affixing them to his land, and if he were selling the land, he would surely include

text of the Code, however, is not clear on this point and the rules of 9-313(4)(b) cast some doubt on the underlying purpose of subsection (4)(a).

b. Subsequent Lien Creditors

The second class of persons protected by section 9-313(4) are creditors with liens "on the real estate subsequently obtained by judicial proceedings . . . if . . . the lien by judicial proceedings is obtained . . . without knowledge of the security interest and before it is perfected."⁴⁸ It is difficult to account for the protection afforded such creditors.⁴⁹ A creditor of this class may be seeking to enforce a debt which arose either before the debtor acquired the goods or before they became fixtures. If so, he could not have been misled into extending credit to the debtor in the belief that he could acquire a lien on the goods to enforce the debt. His decision to seek judicial aid to acquire a lien on the debtor's land is not likely to be greatly influenced by his belief that particular goods on the land at that time are, or are not, encumbered. Such a creditor is not usually thought of as a "reliance" creditor.⁵⁰ Why, then, should he acquire priority over a preexisting security interest in fixtures if he acquires his lien without knowledge or constructive notice of the security interest?

the price of the goods in his asking price. If he were mortgaging the land, however, the mortgagee may or may not count on them as part of his security. Professor Gilmore suggests that a buyer or mortgagee assigning an interest in land after the owner has purchased goods subject to a security interest but before the goods have been affixed to the land should be treated as a "subsequent purchaser" if, at the time of his purchase, he knew that the goods were to be affixed to the land. 2 GILMORE § 30.6, at 825-26.

Subsection (4) clarifies two questions previously unanswered by the Uniform Conditional Sales Act: Whether a person purchasing land at a foreclosure sale of a real estate mortgage which predated the affixation of goods to the land would qualify as a "subsequent purchaser" of an interest in the land, and, if so, whether the mortgagee himself, purchasing at his own sale, could so qualify. The argument against treating any purchaser at the foreclosure sale as a "subsequent purchaser" was that his interest was derived from the mortgage and should be deemed to date back to the time the mortgagee acquired his interest in the fixtures. *Id.* § 28.7, at 772-73. The argument against treating a mortgagee purchasing at his own foreclosure sale as a "subsequent purchaser" was presumably that since he was, in effect, buying from himself, he would be pulling himself up by his own bootstraps. Most pre-Code cases did not allow a mortgagee to so improve his position. *Id.* § 28.7, at 773 n.6. The Code explicitly provides that "[a] purchaser of the real estate at a foreclosure sale other than an encumbrancer purchasing at his own foreclosure sale is a subsequent purchaser within this section." See *Karp Bros., Inc., v. West Ward S. & L. Ass'n*, 8 UCC REP. SERV. 257 (Pa. Sup. Ct. 1970).

⁴⁸ 1962 OFFICIAL TEXT WITH COMMENTS § 9-313(4)(b).

⁴⁹ See 2 GILMORE § 30.6, at 826-27; Kripke, *supra* note 12, at 59 (describing 9-313(4)(b) as "unnecessary and unwise").

⁵⁰ Kripke, *supra* note 12, at 59.

A possible explanation is the draftsmen's desire to promote the internal consistency of Article 9.⁵¹ The coordination, however, is not perfect.⁵² The rule of 9-313(4)(b) produces an anomaly within the section itself since an unsecured creditor can obtain priority over a security interest which is denied a secured creditor.⁵³ Moreover, the meaning of "subsequently" in subsection (4)(b) is as unclear as that of "subsequent" in (4)(a). Is a lien obtained after a security interest has attached to the goods but before they have become fixtures a "subsequently obtained" lien? Since the reason for including such creditors in 9-313(4) is obscure, the correct reading is difficult to deduce.⁵⁴

The greatest significance of section 9-313(4)(b) is that it facilitates attack on an unperfected security interest in fixtures by the secured party's arch enemy—the debtor's trustee in bankruptcy. Among the trustee's formidable weapons is his status under the Bankruptcy Act as a hypothetical lien creditor. This status is acquired as of the date of bankruptcy as to all property owned by the bankrupt, with whatever priority over secured creditors of the bankrupt any lien creditor would have.⁵⁵ If the secured party has failed to perfect his security interest by

⁵¹ Under the 1962 OFFICIAL TEXT WITH COMMENTS § 9-301(1)(b), "a person who becomes a lien creditor without knowledge of the security interest and before it is perfected" takes priority over an Article 9 security interest. "Lien creditor" is defined as including "a creditor who has acquired a lien on the property involved by attachment, levy or the like." *Id.* § 9-301(3). The focus is on resolving a conflict between the holder of a Code security interest and one who subsequently acquired a lien on the collateral as personalty through judicial proceedings. Similarly, subsection (4)(b) of section 9-313 resolves a conflict between the holder of a Code security interest in fixtures and one subsequently acquiring a lien on the fixtures *as realty* by judicial proceedings. *See* 2 GILMORE § 30.6, at 826-27; Kripke, *supra* note 12, at 57.

⁵² Under section 9-301(2), if the secured party has a purchase money security interest and files within 10 days after the debtor receives possession of the collateral, his security interest is treated as retroactively perfected as against one who became a lien creditor between the time of attachment of the security interest and the time of filing. No similar period of grace is allowed the secured party under section 9-313(4)(b). *See* 2 GILMORE § 30.6, at 826-27. Mr. Coogan has stated that section 9-301(2) applies even against the lien creditors referred to in 9-313(4)(b), but concedes that his reading is challengeable. 1A COOGAN, HOGAN & VAGTS § 17.04[1], at 1791-92 n.18.

⁵³ Under 9-313(2), a real estate mortgagee whose mortgage antedates the affixation of goods to the mortgaged land loses to the holder of a security interest in those goods which attached before the goods became fixtures, regardless of whether the security interest has been perfected. To have priority over a subsequent lien creditor who acquired his lien on the land without knowledge of the security interest, however, the secured party must have filed notice of his security interest under 9-313(4)(b). Since neither the mortgagee nor the lien creditor is, presumably, one who relied on the fixtures in obtaining his interest in the land, the lien creditor is given greater protection than the mortgagee for no perceptible reason. *See* 2 GILMORE § 30.6, at 826-27.

⁵⁴ *See id.*

⁵⁵ Bankruptcy Act § 70c, 11 U.S.C. § 110(c) (1970).

filing before the date of bankruptcy, section 9-313(4)(b) and the Bankruptcy Act combine to defeat his claim to the goods.⁵⁶

c. Prior Encumbrancers Making Subsequent Advances

Subsection (4)(c) subordinates an Article 9 security interest in fixtures to the interest of a

creditor with a prior encumbrance of record on the real estate to the extent that he makes subsequent advances if . . . the subsequent advance under the prior encumbrance is made or contracted for without knowledge of the security interest and before it is perfected.⁵⁷

The rule may be conceptualized as a special application of the rule of 9-313(2)(a). To the extent of his "subsequent advances," the prior encumbrancer is "purchasing" an additional interest in the realty and should be protected, if he has neither knowledge nor constructive notice of an intervening security interest in fixtures, as an innocent purchaser for value.⁵⁸ It is, however, probably sounder to regard 9-313(4)(c) as creating an exception to the first priority rule: Rather than purchasing a new interest in the realty by his subsequent advance, the prior encumbrancer is enlarging the value of his preexisting interest.⁵⁹ He is protected to the extent of his advance against an unknown and undiscoverable intervening security interest in fixtures to preclude the possibility of his being prejudiced by reliance on the fixtures as part of the security for his advance.

The inclusion of this exception to the general priority rules was prompted primarily by the problems of construction mortgages.⁶⁰ The situation envisioned⁶¹ is one where a landowner desires to erect a building or some other improvement on the land and arranges to borrow the necessary funds. Funds are to be advanced by the lender as construction progresses. The lender receives a mortgage on the land before construction begins and expects the value of his security to grow in rough proportion to the amount of his advances. For the arrangement to accomplish

⁵⁶ Even if he has filed, his security interest may be vulnerable to attack as a voidable preference under section 60 of the Bankruptcy Act or under other provisions of the Act. For a comprehensive discussion of bankruptcy complications relating to the 1962 Official Text of the UCC, see 1A COOGAN, HOGAN & VAGTS § 17.05[4][b]; Kripke, *supra* note 12, at 58-59.

⁵⁷ 1962 OFFICIAL TEXT WITH COMMENTS § 9-313(4)(c).

⁵⁸ Kripke, *supra* note 12, at 72.

⁵⁹ See G. OSBORNE, HANDBOOK ON THE LAW OF MORTGAGES §§ 114, at 172-74, 117, at 185-88 (2d ed. 1970).

⁶⁰ Kripke, *supra* note 12, at 49-50.

⁶¹ See generally 2 GILMORE § 30.6, at 827-32; Hawkland, *supra* note 3, at 47-48; Kripke, *supra* note 12, at 71-74.

this purpose, it is essential that materials and equipment installed on the land during the course of construction be free of liens superior to that of the mortgagee. Usually the loan agreement expressly commits the owner to see that such materials and equipment are free of purchase money liens.

Occasionally, the owner-mortgagor, after receiving an advance from the construction mortgagee, diverts these funds to non-construction uses. To keep the construction going, he obtains needed materials and equipment from suppliers on credit, with the suppliers retaining purchase money security interests in the goods supplied. Similarly, if the construction loan is inadequate to cover all costs of the project, the owner might obtain some needed materials and equipment on credit, subject to purchase money security interests in favor of the suppliers. In either event, if the goods in question become fixtures when installed on the land, and if the chattel suppliers are given priority over the construction lender, the latter will not have the first lien he expected. On the other hand, if the chattel suppliers are subordinated to the construction lender, they will have donated their goods to feed the lender's security in circumstances where they have a strong equitable claim to the goods. Such equitable claims endure until the price is paid.

Pre-Code decisions often preferred construction mortgagees against purchase money security interests held by suppliers of construction materials. However, no clear rule in favor of the construction mortgagee developed. Arguably, the construction mortgagee has a stronger claim to priority than other holders of preaffixation interests in the realty because he too could be considered as having a purchase money security interest in the fixtures.⁶²

The Code, in effect, strikes a compromise between the competing claims. When the construction mortgagee advances money to enable the owner-mortgagor to buy goods needed for a construction project and the owner, rather than using the advance for that purpose, obtains the needed goods on credit subject to purchase money security interests, and the goods become fixtures when installed on the land, the chattel suppliers are preferred under the first priority rule of section 9-313(2). The construction mortgagee must protect himself by policing the debtor's use of advances or by withholding part of the loan to discharge the liens of unpaid suppliers.

However, a construction mortgagee who makes an advance after goods have been installed on the land as fixtures subject to purchase money security interests will take priority over the suppliers of the goods unless he knew of the security interests when he made his advance or

⁶² 2 GILMORE §§ 28.2, at 751, 28.7, at 771.

the chattel suppliers had filed notices of their security interests under section 9-313(4)(c) before the advance was made. This protects the construction lender from a danger against which he could not effectively guard—making an advance on the supposedly existing security of additions already made to the land when there are unknown and undiscoverable claims against those additions in favor of others.

While section 9-314(4)(c) may have been drafted primarily to cover the situation of the construction mortgagee, its terms refer broadly to any “creditor with a prior encumbrance of record” who makes a “subsequent advance under the prior encumbrance.”⁶³ This subsection, then, works in favor of any real estate mortgagee whose mortgage contains a valid future advance clause. Moreover, the rule applies not merely to conflicts between prior encumbrancers and holders of purchase money security interests but to all conflicts between prior encumbrancers and holders of Article 9 security interests in fixtures.⁶⁴

As is true of paragraphs (4)(a) and (4)(b) of section 9-313, the time reference of subsection (4)(c) is ambiguous when it speaks of “prior” encumbrances and “subsequent” advances. The rationale suggested above as to subsection (4)(c)’s application to construction mortgage cases supports the position that the critical time is when the goods become fixtures.⁶⁵

The rule of 9-313(4)(c), however, goes farther than protecting a prior encumbrancer who makes a subsequent advance without knowledge of a security interest and before it is perfected. The mortgagee is also preferred if an advance has been “contracted for without knowledge of the security interest and before it is perfected,” even though he knows of the security interest or it has been perfected by the time he makes the advance.

Subsection (4)(c)’s “contracted for” language has been severely

⁶³ “Encumbrance” is not defined. Surely it would include a mortgage or deed of trust on the real estate. *Id.* § 30.6, at 828. What more might come within the term is conjectural. Why the encumbrance should be required to be “of record” has been questioned. *Id.* § 30.6, at 828. *But see* 1A COOGAN, HOGAN & VAGTS § 17.05[1], at 1796.

⁶⁴ Doubtless the Article 9 security interest involved *will*, in most cases, be a purchase money security interest. *See* 2 GILMORE § 35.8, at 944; Kripke, *supra* note 12, at 73-74. The statutory rule, however, is not limited to such interests.

⁶⁵ *See* Kripke, *supra* note 12, at 72 n.87. Professor Gilmore would require the rule to protect a mortgagee who made his advance after attachment of the security interest and before the goods became fixtures *if he knew when the advance was made that the debtor was acquiring the goods with intent to affix them to the land*. 2 GILMORE § 30.6, at 828. In *House v. Long*, 244 Ark. 718, 426 S.W.2d 814, 5 UCC REP. SERV. 236 (1968), a case involving purchase money security interests, it was held that the time the goods became fixtures was the critical time. The court reasoned that it is only after that time that a prior mortgagee could be induced by them to make additional advances.

criticized for vagueness.⁶⁶ To what sort of "contract" does this refer, and when must the contract be made? One might read the Act as meaning that if a prior real estate mortgage merely provides that it is to secure future advances, such advances have been "contracted for" as of the time of the execution of the mortgage. Such a reading, however, would render part of paragraph (4)(c) superfluous and would seriously undermine the first priority rule.⁶⁷ In all probability, the "contracted for" language was intended to preserve the common law doctrine that a mortgagee making an "obligatory" future advance is entitled to priority over intervening liens and encumbrances even though the mortgagee is aware of such intervening interests when he makes the advance. Making a "voluntary" or "optional" advance, however, would not entitle the mortgagee to such priority unless he is unaware of the intervening interests. Indeed, some courts require that the mortgagee making an optional advance have neither knowledge nor constructive notice of the intervening interests.⁶⁸ The rationale for this distinction seems to be that the mortgagee who is already contractually committed to make an advance when he learns of a conflicting interest in the mortgaged property has no means of protecting himself and must make the advance. In the absence of a prior commitment, however, the mortgagee can protect himself by refusing to make the advance after he has learned, or is capable of learning, of the intervening interests. Even if the Code is assumed to refer to "obligatory" advances only, what advances will be found to be obligatory is highly uncertain.⁶⁹

There is also uncertainty as to when the advance must have been "contracted for" under 9-313(4)(c). The rationale of pre-Code decisions suggests that any commitment made before the conflicting security interest is known or perfected would suffice.⁷⁰ However, if the Code rule

⁶⁶ 2 GILMORE § 30.6, at 828.

⁶⁷ *Id.*

⁶⁸ See *id.* § 35.4, at 925-31; Comment, *Mortgages to Secure Future Advances: Problems of Priority and the Doctrine of Economic Necessity*, 46 Miss. L.J. 433 (1975).

⁶⁹ See note 68 *supra*. Aside from the uncertainty of prior case law, there is a question of how paragraph (4)(c) should be read in order to effectuate the policy of section 9-313 as a whole. Professor Gilmore would treat advances as "contracted for" only in "the almost imaginary or hypothetical case of a mortgagee who, after learning of the fixture interest, could nevertheless be compelled to honor his commitment." If so construed, "[c]ontracted for" will do no great harm." 2 GILMORE § 30.6, at 829. Mr. Coogan, on the other hand, sees a good possibility that a much less firm commitment is contemplated, since the encumbrance must be on record to give warning to potential chattel financiers. 1A COOGAN, HOGAN & VAGTS § 17.05[1], at 1795-96. Professor Kripke seems to assume that no advance could be deemed "contracted for" even though the commitment was so conditioned that the mortgagee could avoid it upon learning of an intervening security interest. Kripke, *supra* note 12, at 73.

⁷⁰ See 2 GILMORE §§ 35.4, at 926, 28.2, at 750, 28.7, at 774; Comment, *supra* note 68.

is designed to protect prior encumbrancers who have entered into commitments or made advances in reliance on the belief that their advances will be secured by particular fixtures, then the commitment should come within the "contracted for" language only if it is made after the goods in controversy become fixtures.⁷¹

C. The Removability Rule

Under section 9-313(5), a secured party who has priority over all persons having interests in the real estate may remove his fixtures collateral from the land upon default by the debtor. However,

he must reimburse any encumbrancer or owner of the real estate who is not the debtor and who has not otherwise agreed, for the cost of repair of any physical injury, but not for any diminution in value of the real estate caused by the absence of the goods removed or by any necessity of replacing them. A person entitled to reimbursement may refuse permission to remove until the secured party gives adequate security for the performance of this obligation.⁷²

The subsection makes clear that "fixtures," in the Code sense of the term, are removable to enforce a security interest, despite some pre-Code authority which, employing a different concept of "fixtures," precluded their removal.⁷³ As a practical matter, subsection (5) gives the secured party a *meaningful* security interest. If he can remove his collateral, the secured party has two options: (1) remove his collateral and sell it, thereby obtaining at least partial payment of the debt due him; or (2) threaten to remove the collateral and thereby induce those with interests in the land to pay the debt in order to keep the property as it is. Without the right of removal, any theoretical priority the secured party has will be of little benefit. A foreclosure sale of goods irremovably affixed to land not being sold is likely to attract few bidders. Similarly, holders of conflicting real estate interests will not be greatly motivated to pay off the secured debt.⁷⁴

⁷¹ 1A COOGAN, HOGAN & VAGTS § 17.05[1], at 1796; Kripke, *supra* note 12, at 72.

Aside from all of these interpretative difficulties, there remains a policy question as to how much protection should be afforded to prior encumbrancers, particularly construction mortgagees, making future advances. The Code's stingy rules have aroused dissatisfaction among construction financiers. See Funk, *The Proposed Revision of Article 9 of the Uniform Commercial Code*, 26 BUS. LAW 1465, 1472 (1971).

⁷² 1962 OFFICIAL TEXT WITH COMMENTS § 9-313(5).

⁷³ See note 17 *supra*.

⁷⁴ See 1A COOGAN, HOGAN & VAGTS §§ 16.07[3], 17.03, 17.14[2]; 2 GILMORE § 30.3, at 809 n.2. See also HENSON, *supra* note 23, § 8-2, at 188-89. It should be noted that the right to remove the collateral is dependent upon the secured party's having priority over all persons with interest in the real estate, and upon his reimbursing any person with an

Leading commentators have suggested that subsection (5) states the principal rule of section 9-313, while the other rules are designed merely to facilitate a determination of when the extremely valuable, but conditional, right to removal exists.⁷⁵

D. Perfection Rules

The preceding discussion underscores the importance of "perfection" of a security interest under section 9-313. Perfection is necessary to fully protect the secured party against the claims of persons acquiring or enlarging interests in the real estate after a security interest has attached to goods which are or are to become fixtures. Perfection is important under other Code sections as well. For example, if a debtor removed fixtures from the land and sold them to a buyer who had neither actual nor constructive knowledge of a security interest in the goods, the buyer would probably take the goods free of the security interest under section 9-301(1)(c).⁷⁶ If the debtor gave another creditor a chattel mortgage on the fixtures, and that creditor perfected his security interest by filing before the holder of the earlier security interest perfected his own, the later chattel mortgagee would normally have priority over the earlier secured party under section 9-312(5)(a).⁷⁷

interest in the real estate, other than the debtor, for the cost of repair of any physical damage to the real estate caused by the removal of the fixtures collateral. The liability does not extend, however, to reduction in the "going value" of the property resulting from removal of the fixtures.

The draftsmen of the Code considered the rule an improvement over prior legislation, particularly the Uniform Conditional Sales Act, which prohibited removal of fixtures if "material injury" to the freehold would result, but permitted removal without any reimbursement of real estate interests if no such "material injury" would result. The courts were split on whether a diminution in the "going value" of the realty constituted "material injury." As a result, the secured party either could not remove his collateral at all or could do so without any liability for damage suffered by real estate interests. See 1962 OFFICIAL TEXT WITH COMMENTS § 9-313, Comment 5.

⁷⁵ See 1A COOGAN, HOGAN & VAGTS §§ 16.07[3], 17.03, 17.14[2]; 2 GILMORE § 30.3, at 809.

⁷⁶ [A]n unperfected security interest is subordinate to the rights of, in the case of goods, a person who is not a secured party and who is a transferee in bulk or other buyer not in ordinary course of business to the extent that he gives value and receives delivery of the collateral without knowledge of the security interest and before it is perfected.

1962 OFFICIAL TEXT WITH COMMENTS § 9-301(1)(c). If the buyer was a "buyer in the ordinary course of business" (defined in section 1-201(9)), he would be protected even if the security interest was perfected, unless the subject matter of the sale was farm products and the seller a farmer. *Id.* § 9-307(1). Since section 9-313 deals with priorities between Article 9 security interests and interests in the fixtures arising under real estate law, it presumably would not apply. The sale of fixtures alone would be characterized most appropriately as a sale of the goods as chattels. See generally 1A COOGAN, HOGAN & VAGTS § 16.02[1].

⁷⁷ In all cases not governed by other rules stated in this section . . . priority

Except in rare circumstances, the only way to perfect a security interest in fixtures is to file a financing statement.⁷⁸ Two obvious questions facing the secured party are: *What* should be filed, and *where* should it be filed?

1. What to File

The formal requirements for a financing statement are prescribed by section 9-402. The first sentence of subsection (1) lays down the essentials for any financing statement: (1) signature of both the debtor and the secured party; (2) addresses of both; and (3) "a statement indicating the types, or describing the items, of collateral."⁷⁹ The third sentence adds a requirement for a financing statement covering fixtures collateral: "When the financing statement covers . . . goods which are or are to become fixtures, the statement must also contain a description of the real estate concerned."⁸⁰ Subsection (5) provides that "a financing statement substantially complying with the requirements of this section is effective even though it contains minor errors which are not seriously misleading."⁸¹ Moreover, section 9-402 should be read with section 9-110: "For the purposes of this Article any description of personal property or real estate is sufficient whether or not it is specific if it reasonably identifies what is described."⁸²

Although the formal requirements are relatively simple and compliance need not be free of error, the secured party should remember that a filing as to fixture collateral requires a description of the real estate concerned. Although a street address may suffice,⁸³ a complete failure to make any description of the land is likely to be treated as rendering the financing statement inadequate to perfect the security interest, rather than as a "minor error."⁸⁴

between conflicting security interests in the same collateral shall be determined as follows:

(a) in the order of filing if both are perfected by filing, regardless of which security interest attached first under Section 9-204(1) and whether it attached before or after filing. . . .

1962 OFFICIAL TEXT WITH COMMENTS § 9-312(5)(a). Section 9-313's priority rules would not apply because the chattel mortgage signifies the intent of the parties to encumber the goods as chattels. See 2 GILMORE § 30.6, at 822 n.2.

⁷⁸ See note 46 *supra*.

⁷⁹ 1962 OFFICIAL TEXT WITH COMMENTS § 9-402.

⁸⁰ *Id.*

⁸¹ *Id.* § 9-402(5).

⁸² *Id.* § 9-110.

⁸³ *Home Savings Ass'n v. Southern Union Gas Co.*, 11 UCC REP. SERV. 639, 644 (Tex. Civ. App. 1972) (dictum).

⁸⁴ *In re Shepherd*, 14 UCC REP. SERV. 249 (W.D. Va. 1974); *In re Sulphin*, 13 UCC REP. SERV. 557 (W.D. Va. 1973); *John Hancock Mut. Life Ins. Co. v. Commercial Credit Equip. Corp.*, 44 Okla. B.A.J. 55, 12 UCC REP. SERV. 555 (Ct. App. 1973); *Home Sav.*

2. Where to File

Section 9-401(1) prescribes the place to file a financing statement. The 1962 Official Text offers enacting legislatures three alternative versions of this subsection, but all specify that

when the collateral is goods which at the time the security interest attaches are or are to become fixtures, then [the proper place to file is] in the office where a mortgage on the real estate concerned would be filed or recorded.⁸⁵

Where the collateral is not goods which at the time the security interest attaches are or are to become fixtures, the place or places of filing are determined by quite different criteria.⁸⁶

3. The Secured Party's Dilemma

The 1962 Official Text establishes mutually exclusive methods for perfecting security interests in fixtures and other collateral. If the collateral is "goods which at the time the security interest attaches are or are to become fixtures,"⁸⁷ the financing statement must be filed in the office where a mortgage on the land concerned would be filed or recorded, and it must include a description of the land.⁸⁸ Such a filing will perfect a security interest in fixtures against both the real estate interests listed in section 9-313(4) and all other third persons having claims to the fixtures.⁸⁹ Conversely, filing a financing statement which does not ade-

Ass'n v. Southern Union Gas Co., 11 UCC REP. SERV. 639 (Tex. Civ. App. 1972) (where no real estate description appeared in space provided in printed financing statement form, the statement was inadequate to perfect a security interest in fixtures, even though the address of the debtors shown was in fact the address where the fixtures were located); see *First Nat'l Bank v. Calvin Pickle Co.*, 44 Okla. B.A.J. 2069, 12 UCC REP. SERV. 943 (1973) (reversing lower appellate court ruling that the lack of real estate description in financing statement covering growing crops was a minor error which was not seriously misleading).

⁸⁵ 1962 OFFICIAL TEXT WITH COMMENTS § 9-401(1). The provision appears as paragraph (a) in the first alternative and paragraph (b) of the second and third alternatives.

⁸⁶ Under the first alternative subsection (1) of section 9-401, all filings other than those concerning fixtures are made in the office of the Secretary of State or equivalent officer. Under the second and third alternatives, filing as to non-fixture collateral may be required to be made with a central state official or in one or more local offices or (under the third alternative) both centrally and locally. Only if the collateral is crops does the location of land with which the collateral is associated have any bearing on the place of filing. 1962 OFFICIAL TEXT WITH COMMENTS § 9-401(1).

⁸⁷ *Id.* § 9-402(1).

⁸⁸ *Id.* § 9-401(1). Section 9-401(1) does not include the words "when the security interest attaches," but simply requires a description of the land to be included "[w]hen the financing statement covers . . . goods which are or are to become fixtures" There is, however, no apparent reason why the required contents of a financing statement would depend on facts existing at a different time than those controlling the place of filing.

⁸⁹ *Cf.* note 46 *supra*.

quately describe the real estate will not perfect a security interest in the fixtures collateral, and filing in the wrong office is effective only against persons with actual knowledge of the contents of the financing statement.⁹⁰

If the collateral is goods which neither are nor are to become fixtures, it *may* not be necessary for the secured party to take any steps to perfect his security interest beyond those necessary for its "attachment."⁹¹ If filing is a condition of perfection of a security interest in non-fixture goods, a description of land must be included in the financing statement only if the collateral is "crops growing or to be grown."⁹² Filing will have to be made in an office or offices which often do not include the office where a mortgage on any particular real estate would be filed or recorded.⁹³

The exclusivity of the filing rules for fixtures and nonfixtures places a premium on the accuracy of the secured party's judgment at the time his security interest attaches to goods. He must determine whether the goods "are or are to become fixtures" and, if so, what is the "land concerned." These may not be easy decisions. The secured party may often be uncertain as to whether a court or jury will ultimately classify the collateral as fixtures. Even if the secured party knows all the relevant facts, he may still be unsure of the answer because the Code leaves a significant portion of the determination of "whether and when . . . goods become fixtures"⁹⁴ to non-Code law which may be unclear and difficult to apply.⁹⁵

The secured party may also encounter difficulty if the goods are not already affixed to land when the security interest attaches. He must

⁹⁰ 1962 OFFICIAL TEXT WITH COMMENTS § 9-401(2) provides:

A filing which is made in good faith in an improper place or not in all of the places required by this section is nevertheless effective with regard to any collateral as to which the filing complied with the requirements of this Article and is also effective with regard to collateral covered by the financing statement against any person who has knowledge of the contents of such financing statement.

⁹¹ *Id.* §§ 9-302(1)(c), (d).

⁹² 1962 OFFICIAL TEXT WITH COMMENTS § 9-402(1).

⁹³ See note 86 *supra*. At times, a mortgage on land associated with the collateral would be filed or recorded at the same office for filing a financing statement as to non-fixture collateral. A filing there, however, may not suffice to perfect the security interest. If the financing statement covers fixtures and is recorded and indexed in the real estate records, a searcher of the chattel records will not find it. If the collateral is not fixtures, the financing statement should not be constructive notice of a security interest in it. See *In re Leckie Freeburn Coal Co.*, 405 F.2d 1043 (6th Cir.), *cert. denied*, 395 U.S. 960 (1969).

⁹⁴ 1962 OFFICIAL TEXT WITH COMMENTS § 9-313(1).

⁹⁵ 1A COOGAN, HOGAN & VAGTS § 16.06[1]; Hawkland, *supra* note 3, at 46-50; Kripke, *supra* note 12, at 62.

determine whether the goods "are to become fixtures," for, if so, a filing in the place and manner prescribed for fixtures will have to be made to perfect his security interest.⁹⁶ The secured party may not know how the debtor plans to use the goods and hence be unable to predict whether they will become fixtures. To make the filing rules workable, the expression "goods which at the time the security interest attaches are or are to become fixtures" in section 9-401(1) should be read as referring to the situation *as it appears to the secured party* at the time his security interest attaches. If he had no reason to believe the debtor planned to affix the goods to land so that they would become fixtures, he should be able to perfect his security interest by a filing appropriate for nonfixture collateral. If, after his filing, the goods do become fixtures, his perfection should continue without a new filing under the rule of section 9-401(3):

A filing which is made in a proper place in this state continues effective even though the debtor's residence or place of business *or the location of the collateral or its use*, whichever controlled the original filing, is thereafter changed.⁹⁷

The Code, however, does not plainly dictate this reading. Even if it is accepted, uncertainty exists as to when the secured party should be charged with knowledge that the goods "are to become fixtures." Moreover, what type of investigation of the debtor's intended use of the goods is he expected to make?

Occasionally, the secured party may know, or have reason to know, that the goods will become fixtures but be unable to determine where they might be affixed. In this case, the secured party is unable to immediately comply with the statutory requirement that the land be described if the financing statement "covers . . . goods which are or are to become fixtures." Would the secured party be protected if he took the only practical course and filed in accordance with the rules for nonfixture collateral?⁹⁸

The secured party may be able to solve this dilemma by filing as if the goods were fixtures and filing again as if they were not.⁹⁹ This, however, is small comfort for the secured party who does not know where the goods are to be installed as fixtures. In other cases of uncertainty, double-filing may be a feasible course,¹⁰⁰ but it may often prove uneconomical.

⁹⁶ 1962 OFFICIAL TEXT WITH COMMENTS §§ 9-401(1), -402(1).

⁹⁷ *Id.* § 9-401(3) (emphasis added); cf. 1A COOGAN, HOGAN & VAGTS § 17.05[4][a].

⁹⁸ See 1A COOGAN, HOGAN & VAGTS § 17.05[4][a]; Kripke, *supra* note 12, at 60.

⁹⁹ Kripke, *supra* note 12, at 61.

¹⁰⁰ Of course, no Code filing will help him if the goods are held to have become an integral part of the realty under the first sentence of 1962 OFFICIAL TEXT WITH COMMENTS § 9-313(1). See note 12 and accompanying text *supra*.

The secured party's dilemma is particularly acute when the debtor is a business organization with property on many tracts of land located in numerous counties of the state. If the organization grants a security interest on all of a particular type of equipment, and the equipment is fixtures or there is doubt as to whether it will be classified as fixtures, the secured party will have to file in the real estate recording office of each county involved. Further, he will have to include descriptions of all the real estate in the county on which the debtor's equipment is located in each financing statement. The Official Text makes no special provision to relieve the secured party of this burden.

E. Some Loose Ends

1. Combined Mortgages

Mortgages on real estate sometimes expressly cover fixtures on the mortgaged land and, perhaps, even purely personal property of the debtor located on or used with the land. Insofar as the mortgage creates a security interest under the law of real property, the UCC has no application to the validity or perfection of the interest.¹⁰¹ Such a mortgage may, under real property law, give the mortgagee an interest in fixtures on the land, even without express mention of them, on the basis that as accessions to the land they have become sufficiently real property to pass with a conveyance of the land. This possibility is expressly recognized in the last sentence of section 9-313(1): "This Act does not prevent creation of an encumbrance upon fixtures or real estate pursuant to the law applicable to real estate."¹⁰²

The Code *would* apply, however, if the mortgage indicated an intention to give the mortgagee an interest in fixtures as personalty,¹⁰³ and, of course, it applies to the extent that the mortgage covers purely personal property. Nothing in the Code requires that an agreement creating an Article 9 security interest be evidenced by a writing which serves no other purpose. Also, there is no apparent reason why a real estate mortgage cannot also constitute an Article 9 security agreement.

Conceivably, the mortgagee could derive some advantage from having both a real estate security interest and a chattel (Article 9) security interest in fixtures located on the mortgaged land. For example, if he follows Code procedures to acquire and perfect a security interest in

¹⁰¹ 1962 OFFICIAL TEXT WITH COMMENTS § 9-104(j) excludes the "creation or transfer of an interest in or lien on real estate" from the scope of the Article.

¹⁰² *Id.* § 9-313(1); see 1A COOGAN, HOGAN & VAGTS § 17.10.

¹⁰³ 1962 OFFICIAL TEXT WITH COMMENTS § 9-313 is itself a recognition that an Article 9 security interest in fixtures may be created and enforced against the fixtures alone. Also, the exclusion of section 9-104(j) is qualified by "except to the extent that provision is made for fixtures in section 9-313." *Id.* § 9-104(j).

fixtures, and if, under section 9-313, he would have priority over all conflicting real estate interests, subsection (5) would authorize him to remove the fixtures from the land to enforce his security interest without foreclosing on the land. Under real estate law, however, it is unlikely that he could foreclose on the fixtures alone.¹⁰⁴ A combination of real and personal property security interests in the fixtures would thus give the mortgagee greater flexibility of remedies in the event of default by his debtor.

Drafting a real estate mortgage to qualify as an Article 9 security agreement covering fixtures on the mortgaged land or purely personal property on, or associated with, the mortgaged land would not be difficult. The main requirement of Article 9 is that the collateral be described sufficiently to identify it.¹⁰⁵ Since the Code does not require specific description,¹⁰⁶ the collateral can be described in very general terms, such as "all fixtures now on or hereafter affixed to" the described land. However, if the secured party is particularly interested in covering specific items or types of fixtures or purely personal property, a more particularized description is a safer practice.

The mortgage, or a copy of it, can also serve as a financing statement for purposes of filing to perfect the Article 9 security interest.¹⁰⁷ Perfection of the Article 9 security interest by use of the mortgage as a financing statement, however, requires some care. First, the mortgage will not suffice as a financing statement under Article 9 unless it contains all the information required by section 9-402(1) *and* is signed by *both* the debtor and the secured party.¹⁰⁸ Thus, the mortgage, or any copy of it, filed to comply with Article 9 will have to bear the signature of both the mortgagor and mortgagee. Furthermore, filing or recording the mortgage in compliance with real estate mortgage law may not be sufficient to perfect the security interest under Article 9.

The Code does not explicitly prescribe the manner in which the filing officer should handle financing statements on fixtures. If the filing

¹⁰⁴ See 1A COOGAN, HOGAN & VAGTS § 17.10.

¹⁰⁵ The Code's formal requirements for an enforceable security agreement are simple. 1962 OFFICIAL TEXT WITH COMMENTS § 9-203(1)(b) requires the debtor to sign an agreement creating or providing for a security interest which contains a description of the collateral. Of course, the security interest would not "attach" to the collateral until value was given and the debtor had rights in the collateral, *id.* § 9-204(1), but these requirements would normally be met as to any existing fixtures if the mortgage was effective to give the mortgagee an interest in the land itself.

¹⁰⁶ *Id.* § 9-110 states:

For the purposes of this Article any description of personal property or real estate is sufficient whether or not it is specific if it reasonably identifies what is described.

¹⁰⁷ See *id.* § 9-402(1).

¹⁰⁸ *Id.*

officer has set up files and indexes for Article 9 financing statements which are separate from the real estate mortgage records, it may be held that a real estate mortgage duly filed, recorded, and indexed as such will not serve to perfect a Code security interest in fixtures even though the mortgage shows an intent to create such an interest.¹⁰⁹ Moreover, if the mortgage covers purely personal property, an additional filing in at least one office other than the office where a mortgage on the real estate is filed or recorded will almost certainly be necessary to perfect the security interest in the personal property.¹¹⁰

Finally, it should be noted that financing statements filed under the Code have a limited effective duration of five years. A "continuation statement," however, may be filed before the original filing lapses, extending the effective period of the filing for an additional five years.¹¹¹ The filing or recording of the real estate mortgage may, under applicable real estate law, remain effective indefinitely without need for further action. To the extent the mortgage serves as an Article 9 financing statement, it is necessary to comply with the Code rules to obtain a continually perfected security interest.

2. Tenants' "Fixtures"

The 1962 Official Text does not deal specifically with problems arising when goods are affixed to land which is not owned by the owner of the goods. In the context of disputes between persons claiming chattel security interests in the goods and persons claiming the goods as part of the realty, the owner of the goods, and the creator of the chattel security interest in them, is likely to be a tenant in possession of the land.

One question arising in such a case is whether the goods in question become "fixtures" in the Code sense of the term. Assuming that chattel security interests in the goods can exist, section 9-313(1) refers us to non-Code law for an answer. As suggested above,¹¹² the most relevant precedents would be cases addressing the issue of whether those with interests in the real estate would have rights in the goods as a result of their having become accessions to the land.

The law of tenants' "fixtures" is unsettled in the United States.¹¹³

¹⁰⁹ See *In re Plummer*, 6 UCC REP. SERV. 555 (E.D. Mich. 1969). In any event, the secured party would apparently be required to pay a double fee: the normal fee for real estate mortgage filing or recording and the fee prescribed by section 9-403(5) for the filing of a financing statement.

¹¹⁰ See note 86 and accompanying text *supra*.

¹¹¹ 1962 OFFICIAL TEXT WITH COMMENTS § 9-403(2), (3).

¹¹² See note 21 *supra*.

¹¹³ See 5 AM. LAW PROP. § 19.11, at 39, on which the generalization as to the law of

There is, however, an evident tendency to favor the tenants' right to remove his affixations, provided he has not contracted away this right. This right is conditioned upon the tenant's removal of the goods *before* surrendering possession of the premises.¹¹⁴ The decisions so holding are primarily based upon a factual inference that, in making the affixations, the tenant did not intend his goods to become permanently affixed to the land. It thus seems to follow that the goods acquire no legal character as real estate and remain purely personal property.¹¹⁵ If this reasoning is followed, section 9-313 should have no further application, and the secured party should prevail over the landlord and other holders of real estate interests simply because they have no property interests in the goods.

Unfortunately, this "tenant's right of removal" rationale is not universally accepted.¹¹⁶ An alternative theory is that although the goods in question become real property upon affixation by the tenant, he has an extraordinary right to remove them before the end of his term and thereby reconvert them into purely personal property.¹¹⁷ This view would lead to the conclusion that section 9-313's priority and removability rules apply as long as the goods remain on the land.

If the tenant's affixations are "fixtures" for Code purposes, the secured party is more likely to find his security interest subordinate to the rights of persons protected by section 9-313(4). Without canvassing all the possible permutations, one might consider the application of subsection (4) to the case of one who buys the land or takes a mortgage on it after the goods have become fixtures subject to an unperfected chattel security interest of which he has no knowledge. Pre-Code law generally took the position that if the tenant was still in possession of the land at the time of the purchase, the grantee or mortgagee would be on notice of the tenant's rights. Since the grantee or mortgagee presumably would have discovered these rights if a reasonable inquiry were made,¹¹⁸ the purchaser would take subject to the tenant's rights, and one with a chattel security interest granted by the tenant in his "fixtures" would derive his priority from the tenant.¹¹⁹ Section 9-313(4) is, however, not drafted to yield this result. Under that provision, security interests in fixtures

tenants' "fixtures" in the following text are largely based. *See also* Kripke, *supra* note 12, at 66-69.

¹¹⁴ 5 AM. LAW PROP. § 19.11, at 41.

¹¹⁵ *Id.* at 42-43.

¹¹⁶ *See id.* at 44-45.

¹¹⁷ *See id.* at 39.

¹¹⁸ *Id.* at 43.

¹¹⁹ *See id.* at 48; Kripke, *supra* note 12, at 66.

do not take priority over . . . a subsequent purchaser for value of any interest in the real estate . . . if the subsequent purchase is made . . . without knowledge of the security interest and before it is perfected.¹²⁰

Under the Code, knowledge means "actual knowledge."¹²¹ Mere notice of the tenant's rights arising from his possession of the land apparently does not suffice to subordinate the purchaser to the security interest.¹²² It is doubtful that any such change in the law was intended by the draftsmen of the Code. More likely, the application of section 9-313 to cases involving tenants' "fixtures" simply was not taken into account.¹²³

Another problem area involving tenants' affixations concerns filing. If the goods in question are held to be fixtures, the appropriate place to file a financing statement is the office where a mortgage on the land concerned would be recorded.¹²⁴ This filing requirement was obviously intended to tie the financing statement into the real estate mortgage indexing system and thereby ensure that title searchers would acquire notice of security interests in fixtures in the course of a real estate title search.¹²⁵ Yet the Code requires only that the financing statement contain the names of the debtor and the secured party¹²⁶ and that the filing officer index it in the name of the debtor only.¹²⁷ If the tenant's interest in the real estate is not a matter of record, indexing of the financing statement will not tie into the chain of title to the realty involved. It is therefore unlikely that a real estate title search will reveal the financing statement.

¹²⁰ 1962 OFFICIAL TEXT WITH COMMENTS § 9-313(4).

¹²¹ *Id.* § 1-201(25).

¹²² See Kripke, *supra* note 12, at 66-69.

¹²³ See 2 GILMORE § 30.6, at 833. Cases decided under the Code generally have not treated tenant's affixations as "fixtures." The usual dispute has been between a trustee in bankruptcy of the debtor's estate and an Article 9 secured party. The latter normally contends the goods were not fixtures, so as to require a filing in the office where a mortgage on the land would be recorded. The former argues for a fixture classification which calls for filing elsewhere to achieve perfection. See, e.g., *In re Factory Homes Corp.*, 9 UCC REP. SERV. 1300 (W.D. Ark. 1971); *In re Nelson*, 6 UCC REP. SERV. 854 (D. Utah 1968); *In re Particle Reduction Corp.*, 5 UCC REP. SERV. 242 (E.D. Pa. 1968). Professor Gordon has argued that cases of security interest in tenants' affixation should not be governed by the Code. Gordon, *Credit Sales of Installed Equipment—the Uniform Commercial Code's Uneasy Truce Between Realty and Chattel Financing Interests*, 64 NW. U.L. REV. 651, 669-70 (1970).

¹²⁴ 1962 OFFICIAL TEXT WITH COMMENTS § 9-401(1).

¹²⁵ See 1A COOGAN, HOGAN & VAGTS § 16.05, at 1705; Kripke, *supra* note 12, at 51-53.

¹²⁶ 1962 OFFICIAL TEXT WITH COMMENTS § 9-402(1), (3).

¹²⁷ *Id.* § 9-403(4).

3. Contractors' "Fixtures"

The problems created by a building contractor's affixation of goods to the land of another in the course of a construction project are not dealt with satisfactorily by the 1962 Official Text. The typical situation involves a contract between the builder and the landowner which obligates the contractor to supply not only the necessary labor and equipment but also the materials and accessories that are to become part of the completed structure. The owner agrees to pay a specified amount based on the assumption that whatever is affixed to the land under the contract will be free from encumbrances. The contractor, however, may acquire some of the materials and accessories on credit subject to a purchase money security interest in favor of the supplier. When those goods are installed on the land, at least some of them may qualify as "fixtures" under section 9-313. What protection is afforded to the landowner who has paid the contractor with the expectation of receiving unencumbered property in return? What protection is afforded to the owner if, under the contract, he makes payment to the builder after installation of the goods as fixtures without knowledge of outstanding security interests in those goods?

The owner apparently receives no protection.¹²⁸ Where the contractor is paid before the encumbered goods are affixed to the land, the secured parties have priority over the landowner under the first priority rule of section 9-313(2).¹²⁹ Where the owner rendering payment to the contractor is ignorant of existing security interests in goods already affixed to the land, he could be protected only by the rule of 9-313(4);¹³⁰ however, a great stretch of the imagination is required to regard him as a purchaser for value of an interest in the real estate or a creditor with a prior encumbrance of record on the real estate. Yet the owner's plight is comparable to that of a construction mortgagee who makes advances in ignorance of security interests in fixtures on the mortgaged land,¹³¹ and it would seem that he deserves comparable protection against unknown security interests.¹³² The failure to deal expressly with this situa-

¹²⁸ Professor Gordon has argued that this sort of case should be treated as *casus omissus*, governed by non-Code law. Gordon, *supra* note 123, at 669-70.

¹²⁹ See note 23 and accompanying text *supra*.

¹³⁰ See note 46 and accompanying text *supra*.

¹³¹ See text accompanying notes 60 through 62 *supra*.

¹³² See 2 GILMORE § 30.6, at 833. Professor Kripke has advocated even broader protection for the owner. He regards the owner's position as analogous to that of a buyer in the ordinary course of business who, under section 9-307(1) of the Code, takes free of security interests created by his seller even though he knew of the security interest and even though it is perfected. He would modify the Code to invalidate purchase money security interests in chattels which, to the knowledge of the secured parties, will be installed by the buyers on land owned by others. Such secured parties would be required to look to the materialmen's lien statutes for their protection. Kripke, *supra* note 12, at 69-70.

tion was apparently an oversight on the part of the Code's draftsmen.¹³³ This oversight is quite remarkable since the predecessor Uniform Conditional Sales Act explicitly addressed the problem.¹³⁴

Security interests in fixtures granted by contractors also pose a threat to subsequent purchasers for value of interests in the real estate or prior encumbrancers who made subsequent advances. Neither are protected by section 9-313(4) if the security interests have already been perfected.¹³⁵ They can be perfected by filing financing statements which name the contractor as debtor¹³⁶ and are indexed under the contractor's name.¹³⁷ Since contractors normally have had no interests of record in real estate, a real estate title search is unlikely to disclose the financing statements. In short, the purchaser and encumbrancer will have no effective means of discovering the security interests after the contractors have completed their work and moved on to other projects.

4. Inconsistency between Sections 9-313 and 9-312

Under section 9-313(2), a security interest which attaches to goods before they become fixtures (usually a purchase money security interest) takes priority over preexisting real estate interests even though no financing statement is filed.¹³⁸ This absolute priority is consistent with pre-Code law which generally accorded a purchase money security interest in real or personal property priority over all other property interests.¹³⁹ When a purchase money security interest in goods other than inventory conflicts with another Article 9 security interest in such goods, however, section 9-312(4) departs from pre-Code law by conditioning the purchase money interest's priority over a previously perfected security interest on its being perfected within 10 days after the debtor receives possession of the collateral.

It seems anomalous that the rules of 9-313(2) and 9-312(4) should differ. Significantly, this anomaly can produce a situation where the holder of a purchase money security interest in goods will argue that the goods are fixtures, while the opposing holder of a mortgage covering both

¹³³ 2 GILMORE § 30.6, at 833.

¹³⁴ *Id.* Section 7 of the Uniform Conditional Sales Act provided that, as against the owner of realty, the conditional seller's reservation of title to fixtures would be void unless the conditional sales contract was filed before the goods became fixtures. 3 UNIFORM LAWS ANN., Master Ed. § 7, at 496 (1968).

¹³⁵ 1962 OFFICIAL TEXT WITH COMMENTS § 9-313(4)(a), (c).

¹³⁶ *Id.* § 9-402(1).

¹³⁷ *Id.* § 9-403(4).

¹³⁸ See text accompanying note 20 *supra*.

¹³⁹ 2 GILMORE § 30.6, at 822-23.

the land and the personal property on it will contend that the goods are purely personal property.¹⁴⁰ Since this is the reverse of the usual position of such opposing parties in pre-Code cases, non-Code law offers even less clear guidance as to the proper classification of the goods than in other fixtures-classification problems.¹⁴¹

5. The Threat of *Moore v. Bay*

The rule of section 9-313(2) gives even an unperfected security interest priority over preexisting real estate interests if the security interest attaches to goods before they become fixtures. This exposes the holder of a preexisting real estate mortgage to a potential loss of his entire security if the mortgagor goes bankrupt.

Suppose that *A* holds a duly recorded mortgage on *B*'s land to secure a debt of \$50,000, and that *B* buys a \$500 item of equipment from *C* under a conditional sales contract. The equipment is installed on the land as a fixture and *C* does not perfect his security interest. *B* is adjudicated bankrupt after defaulting on his obligations to both *A* and *C*. Assuming that *A*'s mortgage interest in the land would not have been vulnerable to direct attack by *B*'s trustee in bankruptcy, to what extent is *A* imperiled by the existence of *C*'s unperfected security interest in the fixture?

Under section 9-313(2), *C* has priority over *A* with regard to the fixture; *C*, however, would not have a valid claim to the rest of the realty subject to *A*'s mortgage. Since *C*'s security interest was unperfected on the date of bankruptcy, the trustee, pursuant to section 70c of the Bankruptcy Act¹⁴² and section 9-313(4)(b) of the Code, could assert a claim to the fixture superior to that of *C*. In addition, the trustee could treat the security interest as a voidable preference under the Bankruptcy Act.¹⁴³ The security interest could thus be preserved for the benefit of the bankrupt's estate.¹⁴⁴ Thus, the trustee would probably have the same priority over *A* to which *C* would be entitled under UCC section 9-313(2).

If the trustee's rights go no further than this, *A* is no worse off than he would have been if there had been no bankruptcy. The trustee's rights, however, may go further. Justice Holmes' opinion in *Moore v. Bay*¹⁴⁵ can be read to mean that if *A*'s interest in the mortgaged realty

¹⁴⁰ See *id.*; Kripke, *supra* note 12, at 74-75.

¹⁴¹ See 2 GILMORE § 30.6, at 822-23.

¹⁴² 11 U.S.C. § 110(c) (1970) (trustee treated as a creditor of the bankrupt with a lien obtained by legal process on all property of the bankrupt as of date of bankruptcy).

¹⁴³ *Id.* § 96(a), (b).

¹⁴⁴ *Id.* § 96(b).

¹⁴⁵ 284 U.S. 4 (1931).

is even partially vulnerable to the trustee's claim, it is *entirely* invalid against the trustee. Applying that rule, because the trustee could take the \$500 fixture, he could take the whole tract of land free of A's \$50,000 mortgage interest. Although the meaning of *Moore v. Bay* has not been conclusively settled, the threat of that case remains a nagging loose end under the 1962 version of the Code.¹⁴⁶

6. The Problem of "Waste"

Nothing in the UCC's fixtures provisions changes the secured party's priorities or removal rights where fixtures subject to a security interest have been substituted by the debtor for other fixtures in which the secured party had no prior interest. The argument for preferring a purchase money security interest in fixtures over preexisting real estate interests is that the holders of the real estate interests are in a poor position to claim priority. As to the holders of these interests, the additions to the realty are a windfall and they would be unjustly enriched at the expense of the purchase money supplier if preferred over him.¹⁴⁷ If, however, a real estate mortgage is the first lien on the land and all its fixtures, and some of those fixtures are removed and replaced with fixtures subject to security interests with the status of first liens, the mortgagee may understandably feel that he is being *impoverished* to benefit the secured parties.

Arguably, any impoverishment of real estate interests is caused, not by the addition of replacement fixtures subject to purchase money security interests, but by the removal of the fixtures replaced. If there was a wrong, it was committed by the debtor, not by the fixtures supplier, and the applicable non-Code law should provide adequate remedies. To deny an innocent purchase money financier of replacement fixtures the right he would normally have under section 9-313 of the UCC against prior real estate interests would be to penalize him for the wrongful acts of others.¹⁴⁸ This argument, however, has not been persuasive to some courts.¹⁴⁹

II. MISSISSIPPI'S UNIFORM COMMERCIAL CODE

The Mississippi version of the UCC¹⁵⁰ differs considerably from the 1962 Official Text in its treatment of security interests in fixtures.

¹⁴⁶ See Hawkland, *supra* note 3, at 48-49.

¹⁴⁷ See note 28 *supra*.

¹⁴⁸ See *Blancob Constr. Corp. v. 246 Beaumont Equity, Inc.*, 261 N.Y.S.2d 227, 231, 23 App. Div.2d 413 (1st Dept., 1965); 2 GILMORE § 30.6, at 836; Kripke, *supra* note 12, at 78-79.

¹⁴⁹ See OSBORNE, *supra* note 59, § 218, at 414 n.38.

¹⁵⁰ MISS. CODE ANN. §§ 75-9-101 *et seq.* (1972).

Indeed, few states have so drastically departed from the goal of nationwide uniformity declared in section 9-102(2)(c).

The catalyst for most of the Mississippi variations appears to have been an article¹⁵¹ by Thomas A. Pfeiler, Assistant Counsel for the United States Savings and Loan League. Mr. Pfeiler criticized the Official Text of the Code¹⁵² as undermining the security of mortgages, particularly with regard to "open-end" mortgages.¹⁵³ He proposed a series of amendments to correct what he perceived as defects in the Official Text, and virtually all of these proposals found their way into the Mississippi UCC. Indeed, the Mississippi UCC accepts the substance and, in most instances, the exact wording of Mr. Pfeiler's proposals except for a few which he indicated "might be desirable"¹⁵⁴ and for which he did not offer amendatory language. The near-identity of Mississippi's departures from the Official Text with those recommended by Mr. Pfeiler suggests that the legislature's motive in enacting these provisions was generally in accord with that of Mr. Pfeiler. Thus, his article may legitimately be drawn upon for aid in interpreting the Mississippi UCC.

A. Perfection Rules

The Mississippi UCC alters several rules governing perfection of security interests in fixtures. Some of them clearly improve the Official Text by correcting oversights of the draftsmen. Others are of more questionable wisdom.

1. Form of Financing Statement

The Mississippi UCC requires that a financing statement filed to perfect a security interest in fixtures contain a "legal description" of the land involved and "name . . . the record owner or record lessee thereof."¹⁵⁵ The latter requirement corrects an apparent oversight of the draftsmen of the Official Text¹⁵⁶ and makes it possible to coordinate the indexing of fixture financing statements with the indexing of real estate

¹⁵¹ Pfeiler, *Uniform Commercial Code—Adverse Effect on Real Estate Mortgages*, 29 U.S. SAVING AND LOAN LEAGUE LEGAL BULL. 201 (1963).

¹⁵² The 1958 Official Text was the version discussed in Mr. Pfeiler's article; however, the provisions of the 1958 version are essentially the same regarding fixtures as the 1962 Official Text.

¹⁵³ Such mortgages provide that if the mortgagee should make optional future advances, the debts so created should be secured by the mortgage.

¹⁵⁴ Pfeiler, *supra* note 151.

¹⁵⁵ MISS. CODE ANN. § 75-9-402(1), (3) (1972).

¹⁵⁶ See 2 GILMORE at § 30.5, at 818-21; REVIEW COMMITTEE FINAL REPORT, *supra* note 7, at 204, item A-13; Kripke, *supra* note 12, at 51-53.

mortgages where the debtor does not have a recorded interest in the real estate upon which the fixtures are located.¹⁵⁷ This situation arises in the previously discussed cases of tenants' and contractors' fixtures.¹⁵⁸ Similar alterations of the Official Text have been made in almost two dozen other states.¹⁵⁹

Questions concerning the wording of these requirements do, however, exist. First, every financing statement intended to cover fixtures apparently must contain the name of the record owner or record lessee *in addition to* the names of the debtor and the secured party.¹⁶⁰ This seems unnecessary if the debtor has a recorded interest in real estate since indexing under his name in the real estate records will suffice to tie the financing statement into the chain of title. To require that the debtor be named again or that some other record owner or record lessee be designated unnecessarily complicates the task of preparing an adequate financing statement. Second, the wording is ambiguous in that it indicates neither when the name of a record owner, rather than that of a record lessee, should be used, nor which of the record owners or record lessees if there are more than one.¹⁶¹ Whether the requirement will achieve its purpose is also questionable since the Mississippi Code fails to require filing officers to index financing statements in the name of the stated record owners or lessees. Justification is less obvious with regard to the requirement of a "legal description" of the land. Mr. Pfeiler

¹⁵⁷ See Kripke, *supra* note 12, at 52; Pfeiler, *supra* note 151, at 205.

¹⁵⁸ See parts I D 2 (tenant's fixtures) and I D 3 (contractors' fixtures) *supra*.

¹⁵⁹ ALA. CODE tit. 7A, § 9-402 (1966); CONN. GEN. STAT. ANN. § 42A-9-402 (1964); FLA. STAT. ANN. § 679.402 (1968); GA. CODE ANN. § 109A-9-402 (1965); HAWAII REV. STAT. § 490.9-402 (1968); IND. ANN. STAT. § 26-1-9-402 (Burn's 1974); ME. REV. STAT. ANN. tit. 11, § 9-402 (1964); MASS. GEN. LAWS ANN. ch. 106, § 9-402 (1974); MINN. STAT. ANN. § 336.9-402 (1962); MO. ANN. STAT. § 400.9-402 (Vernon's 1963); MONT. REV. CODES ANN. § 87A-9-402 (Spec. Supp. 1964); NEV. REV. STAT. § 104.9402 (1976); N.H. REV. STAT. ANN. § 382-A:9-402 (1963); N.J. STAT. ANN. § 12A:9-402 (1961); N.Y. U.C.C. § 9-402 (McKinney 1964); N.C. GEN. STAT. § 25-9-402 (1965); OHIO REV. CODE ANN. § 13.09.39 (1962); R.I. GEN. LAWS ANN. § 6A-9-402 (1969); TENN. CODE ANN. § 47-9-402 (1964); TEX. BUS. & COM. CODE art. 9.402 (Supp. 1968); UTAH CODE ANN. § 70A-9-402 (Interim Supp. 1964); VA. CODE ANN. § 8.9-402 (1965); WIS. STAT. ANN. § 409.402 (1964). The text refers to the pre-1972 versions of these states' Codes. Some of them, however, have not adopted the 1972 Amendments to the Official Text discussed in part II of this article *infra*.

¹⁶⁰ MISS. CODE ANN. § 75-9-402(1) (1972) provides: "When the financing statement covers goods which are, are to, or thereafter become fixtures, the statement must also contain . . . the name of the record owner or record lessee [of the real estate]." (emphasis added). Section 75-9-402(3) (specimen form of financing statement) provides a blank for the name of the debtor and another for the name of the record owner or record lessee of the real estate, with instructions to fill in the latter if the collateral is goods which are, are to, or thereafter become fixtures.

¹⁶¹ See Kripke, *supra* note 12, at 70 n.79.

criticized the Official Text's requirement of a mere "description"¹⁶² of the land because a real estate title searcher, finding a financing statement indexed in the name of someone with a recorded interest in the land, might have difficulty determining whether the fixtures were to be located on the land.¹⁶³

The meaning of "legal description" appears to be specified in section 75-9-110 of the Mississippi Code, wherein the following has been added:

[A] description of real estate in an instrument filed to perfect a security interest in fixtures is sufficient only if the filing or recording of the same constitutes constructive notice under the laws of this state, other than this chapter, which are applicable to the filing and recording of real estate mortgages and deeds of trust.¹⁶⁴

This requirement departs from the intent of the Official Text in that it substantially adds to the burden of preparing an adequate financing statement. Further, its necessity is questionable since a street address or other similarly abbreviated description would ordinarily enable title searchers to identify the land. Providing information from which the exact boundaries of the land may be determined adds little.¹⁶⁵

2. Instructions to Filing Officers

The 1962 Official Text fails to specify where and how filing officers are to index financing statements covering fixtures. Section 9-402(4) contains only a general instruction, applicable to all filings, to "index the statements according to the name of the debtor and . . . note in the index the file number [of the financing statement] and the address of the debtor given in the statement." The following sentence has been added to the Mississippi UCC:

If the instrument covers goods which are, or are to, or thereafter, become fixtures, he shall file or record the same in accordance with the requirements which he is required to observe with respect to the filing or recording of mortgages of real estate under the laws of this state.¹⁶⁶

¹⁶² This description does not have to be "specific if it reasonably identifies what is described." 1962 OFFICIAL TEXT WITH COMMENTS § 9-110.

¹⁶³ Pfeiler, *supra* note 151, at 205.

¹⁶⁴ MISS. CODE ANN. § 75-9-110 (1972). Only six other pre-1972 versions of the Code require a legal description of the land concerned. ARIZ. REV. STAT. ANN. § 44-3110 (1967); FLA. STAT. ANN. § 679.110 (1968); IDAHO CODE § 28-9-110 (1967); KAN. U.C.C. ANN. § 84-9-110 (Vernon 1968); OKLA. STAT. ANN. tit. 12A, § 9-110 (1963); WIS. STAT. ANN. § 409.110 (1964).

¹⁶⁵ See Kripke, *supra* note 12, at 52.

¹⁶⁶ MISS. CODE ANN. § 75-9-403(4) (1972).

Mr. Pfeiler criticized the Official Text's failure to require indexing of fixture financing statements in the real estate records¹⁶⁷ and, presumably, advocated this change in section 9-403 to correct the defect. Indexing obviously should be tied into the real estate records indexing system in accord with the probable intent of the draftsmen.¹⁶⁸ While 9-401(1), which requires that a fixture filing be made in the office where a mortgage on the real estate concerned would be filed or recorded, may imply such a requirement, this implication reportedly has not been understood in some filing offices.¹⁶⁹ Explicit direction does no harm. A substantial number of other states have made similar additions to their Codes.¹⁷⁰

Oddly, the language added to the Official Text in Mississippi does not expressly refer to indexing, although this may well be implied by the direction to "file or record" in the manner of a real estate mortgage. It seems more seriously at fault, however, in failing to call for indexing in the name of the record owner or record lessee as shown by the financing statement. Indexing in accordance with real estate mortgage practice could be taken to mean indexing in the name of the debtor (as "mortgagor") and in the name of the secured party (as "mortgagee"). If neither the debtor nor the secured party has an interest of record in the real estate, a failure to index in the name of the record owner or record lessee will preclude tying the financing statement into the chain of title.¹⁷¹

3. Goods Becoming Fixtures After Security Interest Attaches

The 1962 Official Text requires filing in the office where a mortgage on the land concerned would be filed or recorded "when the collateral is goods which at the time the security interest attaches are or are to

¹⁶⁷ Pfeiler, *supra* note 151, at 204-05.

¹⁶⁸ See Kripke, *supra* note 12, at 53.

¹⁶⁹ *Id.*

¹⁷⁰ Among the jurisdictions, may be counted: *Alabama*: ALA. CODE tit. 7A, § 9-403(4) (1966); *Arizona*: ARIZ. REV. STAT. ANN. § 44-3142(E) (Supp. 1975); *Colorado*: COLO. REV. STAT. ANN. § 155-9-403(5) (Supp. 1971); *Florida*: FLA. STAT. ANN. § 679.9-403(4) (1973); *Georgia*: GA. CODE ANN. § 109A-9-403(4) (1973); *Hawaii*: HAWAII REV. STAT. § 490:9-403(4) (1968); *Kansas*: KAN. STAT. ANN. § 84-9-403(4) (Supp. 1972); *Maryland*: MD. COMM. LAW CODE ANN. § 9-403(4) (1975); *New Mexico*: N.M. STAT. ANN. § 50A-9-401(1)(b) (Supp. 1975); *New York*: N.Y. U.C.C. § 9-403(4) (McKinney Supp. 1975); *North Carolina*: N.C. GEN. STAT. § 25-9-403(4) (Supp. 1975); *Ohio*: OHIO REV. CODE ANN. § 1309.40(4) (Page Supp. 1975).

¹⁷¹ Several states explicitly requiring inclusion of the name of the record owner (or record lessee) of the land also call for indexing in the name of such record owner (or lessee). See, e.g., ALA. CODE tit. 7A, § 9-403(4) (1966); GA. CODE ANN. § 109A-9-403(4) (1973); HAWAII REV. STAT. § 490:9-403(4) (1968); ME. REV. STAT. ANN. tit. 11, § 9-403(4) (1964); MINN. STAT. ANN. § 9-403(4) (1966); NEV. REV. STAT. § 104.9403(4) (1973); N.Y. U.C.C. § 9-403(4) (McKinney Supp. 1975); N.C. GEN. STAT. § 25-9-403(4) (Supp. 1975); OHIO REV. CODE ANN. § 1309.40(4) (Page Supp. 1975); VA. CODE ANN. § 8.9-404(4) (Supp. 1975).

become fixtures."¹⁷² In such cases, the financing statement must describe the land concerned.¹⁷³ As previously noted,¹⁷⁴ this apparently means that if the goods are not fixtures when the security interest attaches and the secured party has no reason to suppose the debtor plans to make them fixtures, the security interest can be perfected by filing in a form and place or places appropriate for non-fixture filing. What if the debtor subsequently affixes the goods to land so that they become fixtures? Presumably, the security interest remains perfected without a new filing.¹⁷⁵

The Pfeiler article found this feature of the Code distressing since a search of the real estate records after the goods had taken on a real property character could not reveal the financing statement.¹⁷⁶ Therefore, it was recommended that the Code be revised to require a filing in accordance with the fixture filing rules in any case where the goods become fixtures after the security interest attaches.¹⁷⁷ The Mississippi UCC follows this recommendation: In this state, the secured party must file in the office where a mortgage on the land concerned would be filed or recorded if "the collateral is goods which at the time the security interest attaches are, or are to become, fixtures, or *which thereafter become fixtures . . .*"¹⁷⁸ The financing statement also must contain a legal description of the land and name the record owner or lessee if the statement "covers goods which are, are to, or *thereafter become fixtures.*"¹⁷⁹

There is some ambiguity in the time reference of "thereafter." It arguably refers merely to the period between attachment of the security interest and the time the filing is made. Mr. Pfeiler's obvious intention, however, was to require fixture filing whenever goods become fixtures, regardless of whether the secured party ever had reason to anticipate that the goods would become fixtures. The Mississippi variations collectively reveal a pervasive purpose to assure that real estate title searchers will be able to rely on the records as reflecting the true state of the title to the real estate at the time of the search. This purpose is best promoted by reading "thereafter" as meaning "at any time thereafter."¹⁸⁰

¹⁷² 1962 OFFICIAL TEXT WITH COMMENTS § 9-401(1) (Alternative A).

¹⁷³ *Id.* § 9-402(1).

¹⁷⁴ See text accompanying note 97 *supra*.

¹⁷⁵ This interpretation is based upon 1962 OFFICIAL TEXT WITH COMMENTS § 9-401(3) which provides that a "filing which is made in a proper place in this state continues effective even though . . . the location of the collateral or its use, whichever controlled the original filing, is thereafter changed."

¹⁷⁶ Pfeiler, *supra* note 151, at 204-05.

¹⁷⁷ *Id.* at 213-15.

¹⁷⁸ MISS. CODE ANN. § 75-9-401(1)(b) (1972) (emphasis added).

¹⁷⁹ *Id.* § 75-9-402(1) (emphasis added).

¹⁸⁰ Pfeiler, *supra* note 151, at 204-05. Additional support for this reading may be found

These changes require the secured party to keep track of his debtor's use of goods collateral and to make a filing if the goods ever become fixtures. The benefit to real estate mortgagees and others who may acquire or enlarge their interests in realty after goods have become fixtures is obvious; however, the justifiability of imposing such a burden on the holder of chattel security interests is questionable. Striking an appropriate balance between competing economic interests is never an easy task. It is not evident, however, why in Mississippi the balance should be tipped in favor of real estate interests to a greater degree than has been found acceptable by the great majority of other states adopting the Code.

One other effect of these changes, perhaps unintended, but which flows logically from the revisions should be noted. Under sections 9-401 and 9-402, if goods collateral become fixtures and no fixture filing has been made, the security interest will be unperfected for all purposes. Thus, even if the contesting party is a buyer of the fixtures as chattels, the security interest is likely to be defeated on the ground that the buyer is entitled to priority over an unperfected security interest. Filing in accordance with the fixture filing rules is the only method provided by the Mississippi Code for perfecting a security interest in fixtures.

4. Perfection "Against the Real Estate"

Under section 9-313(4) of the Official Text, perfection of a security interest in fixtures is necessary for the secured party to have priority over certain persons who subsequently acquire or expand interests in the real estate without knowledge of the security interest.¹⁸¹ The Mississippi UCC contains similar rules in section 9-313(4A)¹⁸² which condition the secured party's priority on the security interest being "perfected against the real estate." This phrase is defined in subsection (4B), which has no counterpart in the Official Text, as follows:

Any provision in this chapter to the contrary notwithstanding, a security interest is perfected against the real estate within the meaning of

in the Mississippi version of section 9-403(4), which adds a sentence to the Official Text (quoted in text accompanying note 166 *supra*) calling upon the filing officer to file or record a financing statement as he would a real estate mortgage "[i]f the instrument covers goods which are, are to, or thereafter become fixtures." MISS. CODE ANN. § 75-9-403(4) (1972). Surely the filing officer is not expected to monitor the collateral after a financing statement has been filed to learn whether the collateral has become fixtures and, if so, to make new records. The only purpose the words "or which thereafter become fixtures" could serve in this subsection would be to instruct the filing officer how to handle a new financing statement offered for filing which covers goods already covered by a filed statement, but one which did not treat the collateral as fixtures.

¹⁸¹ See note 46 *supra*.

¹⁸² MISS. CODE ANN. § 75-9-313(4A) (1972).

subsection(4A) of this section and all other provisions of this chapter only when the filing or recording of an instrument with respect to such security interest constitutes constructive notice of such interest under the laws of this state, other than this chapter, which are applicable to the filing or recording of real estate mortgages and deeds of trust; provided, however, that no provision of this chapter nor of any other law of this state shall be construed to require that an instrument filed to perfect a security interest in fixtures shall have the signature of the parties acknowledged or proved as required by section 89-3-1 of the Mississippi Code of 1972.¹⁸³

The significance of the phrase, so defined, is difficult to deduce. It was proposed by Mr. Pfeiler,¹⁸⁴ who considered the innovation of key importance in modifying the Code to provide more adequate protection for real estate mortgagees.¹⁸⁵ He wrote:

[T]he phrase "perfected against the real estate" has been substituted for the term "perfected." . . . The uncertainties regarding what is required under the Code in order to "perfect" a security interest against a person having an interest in the real estate have operated to compound the problems brought about by section 9-313's changes in the priority rules. The new phrase "perfected against the real estate" is given precise meaning in the suggested new subsection (4B), which is added to section 9-313, thereby clearing up the uncertainty.

Under subsection (4B), a security interest is *perfected against the real estate* only when "the filing or recording of an instrument with respect to such security interest constitutes constructive notice of such interest under the laws of the state [other than the Code] which are applicable to the filing or recording of real estate mortgages." Generally, this means the instrument must contain a proper legal description and be filed in the proper index according to the real estate laws of the state involved.¹⁸⁶

This discussion ties in with Mr. Pfeiler's concern about the possibility of "secret" liens created by the Official Text of the Code. This possibility stems from the Code's failure to require (1) that financing statements covering fixtures be indexed in the real estate records; (2) precise descriptions of the real estate concerned in financing statements covering fixtures; and (3) a filing appropriate for fixtures if goods are not expected to be fixtures when the security interest attaches but later actually become fixtures.¹⁸⁷ In the above quotation, it is implied that the

¹⁸³ *Id.* § 75-9-313(4B).

¹⁸⁴ Pfeiler, *supra* note 151, at 212.

¹⁸⁵ The Mississippi Code differs from the wording proposed by Mr. Pfeiler only by adding the reference to "deeds of trust" and the provision to 9-313(4B).

¹⁸⁶ Pfeiler, *supra* note 151, at 210 (emphasis added).

¹⁸⁷ *Id.* at 204-05.

"perfected against the real estate" concept eliminates at least two sources of the "secret" lien problem.

Yet, as has been demonstrated, all three sources of "secret" liens have largely been eliminated by other changes in the statutory text more directly addressed to the specific Code deficiencies Mr. Pfeiler discerned.¹⁸⁸ Does the "perfected against the real estate" concept add anything of substance to those more specific provisions?

In a circular fashion, the concept may obviate a potential conflict of Code provisions. Mr. Pfeiler's version of 9-401(1) requires filing in the office where a mortgage on the land concerned would be filed or recorded if the collateral is goods which, *when the security interest attaches*, are or are to become fixtures, *or thereafter do become fixtures*. If section 9-401(3) were unchanged, it apparently would contradict the "or which thereafter become fixtures" language of 9-401(1). Presumably to overcome the problem, Mr. Pfeiler proposed,¹⁸⁹ and the Mississippi legislature adopted, a modification of 9-401(3) which prefaces the wording of the Official Text as follows: "Except as provided in subsection (4B) of section 9-313"¹⁹⁰ It was apparently thought that the definition of "perfected against the real estate" in section 9-313(4B) would negate the rule of section 9-401(3) that a filing originally adequate to perfect security interests remains effective even though the location or use of the collateral changes.

Does the "perfected against the real estate" concept accomplish anything more? An affirmative answer is plausible since subsection (2) of section 9-401 is also prefaced by the words "[e]xcept as provided in subsection (4B) of section 9-313."¹⁹¹ Section 9-401(2) of the Official Text deals with the effect of filing in the wrong place:

A filing which is made in good faith in an improper place or not in all of the places required by this section is nevertheless effective with regard to any collateral as to which the filing complied with the requirements of this Article and is also effective with regard to collateral covered by the financing statement against any person who has knowledge of the contents of such financing statement.¹⁹²

¹⁸⁸ Indexing in the real estate records is probably required by the modified instructions to filing officers in section 9-403(4). See text accompanying note 166 *supra*. Precise description of real estate is assured by the requirement of a "legal description" of the land involved in section 9-402(1) and (3) and the modification of section 9-110. See text accompanying note 155 *supra*. Filing appropriate for fixtures is required whenever goods become fixtures, even though they were not expected to become fixtures when the security interest attached and an original filing was made by the changes in sections 9-401(1) and 9-402(1), referring to goods which "thereafter become fixtures." See part II A 3 *supra*.

¹⁸⁹ Pfeiler, *supra* note 151, at 213.

¹⁹⁰ MISS. CODE ANN. § 75-9-401(3) (1972).

¹⁹¹ *Id.* § 75-9-401(2); Pfeiler, *supra* note 151, at 213.

¹⁹² 1962 OFFICIAL TEXT WITH COMMENTS § 9-401(2).

The Mississippi Code thus contemplates that if its provisions are more tolerant of error in complying with filing requirements than the real estate law of constructive notice, the stricter real estate law doctrine should control where Code security interests in fixtures are involved.

It is difficult to imagine fact situations in which this modification is likely to have much practical impact. Indeed, the "perfected against the real estate" provisions of the Mississippi UCC appear in no other state's Code.

5. Utilities' Fixtures

The problems posed by the Official Text where the collateral consists of fixtures located on numerous tracts of land and where mortgages are intended to serve both as real estate mortgages and as Article 9 security agreements have been surveyed above.¹⁹³ A Mississippi amendment to section 9-302, found in subsection (5) thereof, explicitly deals with some of these problems.¹⁹⁴

That subsection deals with the perfection of security interests in the personal property and fixtures of a "utility company"¹⁹⁵ and provides two types of special rules. One deals with mortgages covering both the real property and personal property or fixtures of such a company. If the mortgage is properly filed as a real estate mortgage, no separate filing is required to perfect the mortgagee's security interest in personal property or fixtures covered by the mortgage. Furthermore, perfection as to the personal property and fixtures continues as long as the mortgage remains in effect, without any need for refiling.¹⁹⁶ In all other cases, the proper place to file a financing statement covering the personal property or fixtures of a utility company is the Secretary of State's office. Such a filing remains effective for as long as the security agreement provides. Additionally, neither a description of the real estate on which fixtures are located nor the names of the record owners or lessees of such land is required.¹⁹⁷

¹⁹³ See part I D 1 *supra*.

¹⁹⁴ MISS. CODE ANN. § 75-9-302(5) (1972).

¹⁹⁵ "Utility company" is defined as

any person, corporation, association, or other entity, foreign or domestic, primarily engaged in the railroad or street railway business; the ownership or operation of wires, or cables, used in the transmission or distribution of telephone, telegraph or television signals or any other information or data; the transmission or distribution of oil, gas or petroleum products by pipeline; or the generation, production, transmission, or distribution of electric energy, steam, gas or water, whether its activities be interstate or intrastate.

Id.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

Similar rules, though varying considerably in detail, are found in a number of other state codes.¹⁹⁸ Insofar as the variation permits one central filing of a financing statement covering fixtures on numerous multi-county tracts of land, it seems justified by its obviation of the heavy burden placed on the secured party by the Official Text's normal filing rules. Moreover, title searchers are not likely to be hurt because the nature of the debtor's business should alert them to the applicability of the special rule.¹⁹⁹

The Mississippi Code's treatment of combined mortgages of utility companies is more questionable. The filing problems posed by the Official Text for holders of mortgages serving both as real estate mortgages and Article 9 security agreements may require relief. They are not, however, problems peculiar to "utility companies." If relief is to be granted, it would seem appropriate to extend it to all holders of combination mortgages. Furthermore, the propriety of permitting perfection of a security interest in pure chattels by the recording of a real estate mortgage is questionable. Such chattels may often be insufficiently associated with particular land to charge persons interested in learning of security interests with notice that they should search the real estate records for such security interests, or, in some cases, which real estate records should be investigated. Indeed, the statute does not require that personal property covered by the mortgage have any physical or functional connection with the land covered by the mortgage.

B. Priority Rules

Mississippi's UCC radically departs from the 1962 Official Text not only in its rules governing perfection of security interests in fixtures, but also in its priority rules governing conflicts between Article 9 security interests and real estate interests. The changes appear in subsections (2) and (4) of section 9-313.²⁰⁰

1. Security Interests Attaching to Goods Before They Become Fixtures

Section 9-313(2) of the Official Text prescribes the general rule that a security interest that attaches to goods before they become fixtures, even though unperfected, has priority over all preexisting interests in

¹⁹⁸ See, e.g., ALA. CODE tit. 7A, § 9-302(5) (1966); ALAS. STAT. ANN. § 45.05.734(e) (Supp. 1975); ARIZ. REV. STAT. ANN. § 44-3133 E, F, *as amended*, (Supp. 1975); CONN. GEN. STAT. ANN. § 42a-9-302(5) (Supp. 1975); GA. CODE ANN. § 109A-302(3)(c) (1973), (5) (Supp. 1975); KY. REV. STAT. § 355.9-302(5) (1969); MICH. COMP. LAWS ANN. § 440.9302(5) (1967); N.C. GEN. STAT. § 25-9-302(5), *as amended*, (Supp. 1975).

¹⁹⁹ See 48 ALI PROCEEDINGS 357-58 (1971) (statement of Professor Kripke).

²⁰⁰ Subsection (3) is substantially the same as the corresponding subsection of the Official Text.

the real estate. In Mississippi,²⁰¹ the rule is reversed: A security interest attaching to goods before they become fixtures, whether perfected or not, has no priority over preexisting real estate interests except those whose holders agree in writing to subordinate their interests.²⁰² In other words, since there is no Code-created priority for the Article 9 security interest, priority must be granted by the holders of the conflicting real estate interests.²⁰³

This departure from the Official Text was proposed by Mr. Pfeiler²⁰⁴ and subsequently incorporated in the Mississippi Act. It is presumably designed to overcome a problem which Mr. Pfeiler contended was created by the Official Text: "The existence or absence of a secret lien under subsection (2) might affect the manner in which a real estate mortgagee will handle delinquencies."²⁰⁵

For example, a mortgagee probably would be much more willing to extend leniency to a delinquent borrower if he were sure that his first mortgage is the only lien on the entire property; under these circumstances, he might even be induced to make an additional advance in order to help the borrower out of a temporary financial difficulty. However, under subsection (2) of Section 9-313, while a desperate borrower in narrow financial straits might insist that the real estate is free of fixtures liens, the real estate mortgagee (even by a search) would have no way of knowing whether or not a secret (and prior) lien on the part of the real estate which is represented by a subsequently installed fixture actually is in existence by virtue of said section. The uncertainty created by virtue of the automatic (and secret) priority given to

²⁰¹ MISS. CODE ANN. § 75-9-313(2) (1972) reads:

A security interest which attaches to goods before they become fixtures takes priority as to the goods over the claims of all persons who have an interest in the real estate and who agree in writing to the subordination of their interests except as stated in subsection (4A).

²⁰² *Id.* The subordination of the security interest to real estate interests whose holders do not agree to subordinate their own interests is clearly implied. The words "and who agree in writing to the subordination of their interests" is pointless if the security interest would take priority even in the absence of such agreement. Moreover, Mr. Pfeiler's explanation of the defect in the Official Text wording of subsection (2), which presumably prompted him to recommend this wording, mandates such a reading. See Pfeiler, *supra* note 151, at 207. See also text accompanying note 206 *infra*.

²⁰³ The Article 9 secured party who runs afoul of Mississippi's section 9-313(2) may see a ray of hope in the final words of the subsection, "except as stated in subsection (4A)." A reading of that subsection, however, will quickly extinguish it. Subsection (4A) operates to immunize certain real estate interests from Article 9 security interests. It does not give the secured party any greater rights than he would have under subsection (2).

²⁰⁴ Pfeiler, *supra* note 151, at 211.

²⁰⁵ *Id.* at 207. The "secret lien" here referred to is not the "secret lien" which Mr. Pfeiler found to be made possible by the perfection rules of the Official Text, see text accompanying note 187 *supra*, but a lien "secret" because not on record at all.

fixture-secured lenders under subsection (2) of Section 9-313 might well cause institutional mortgage lenders to take an across-the-board, hard-hearted approach regarding all loan delinquency cases in order to avoid all further detriment to their mortgage interest by virtue of the priority provision of Section 9-313(2).²⁰⁶

While Mr. Pfeiler's proposal certainly relieves the mortgagee of his problems, the seriousness of the problem as well as the wisdom of the solution are debatable. First, Mr. Pfeiler writes as if the Code created the problem. This assumption, insofar as a majority of the states, including Mississippi, is concerned, appears to be unwarranted. Prior to the Code, the majority rule recognized the priority of a conditional seller of goods affixed to land after the sale over holders of prior mortgages on the land.²⁰⁷ The rule in most states,²⁰⁸ and under the Uniform Conditional Sales Act,²⁰⁹ did not require filing or recordation of the conditional sales contract as a condition of its priority.

Mississippi's pre-UCC fixtures law was created almost entirely by the courts. Analytical comparison with the UCC is complicated by the fact that the Mississippi court used the term "fixtures" in a different sense than does the Code. Nevertheless, the conditional seller prevailed in the few cases involving conflicts between a conditional seller of goods subsequently affixed to land and the holder of a preexisting mortgage on the land.²¹⁰ Since section 9-313(2) of the Official Text merely codified the law already prevailing in Mississippi and most other states, it would seem that any hardening of real estate mortgagees' hearts in dealing with delinquent debtors, occasioned by the possibility of "secret" and superior liens on fixtures installed since the execution of the mortgages, would have long since occurred.

Second, if the plight of the mortgagee and the consequent adverse effect on delinquent debtors is considered so serious as to call for remedy, the solution proposed by Mr. Pfeiler and enacted by the Mississippi Legislature goes well beyond what is necessary. An adequate solution would simply require the secured party to record his security interest as a condition of priority. The "uncertainties" of the real estate mortgagee

²⁰⁶ Pfeiler, *supra* note 151, at 207.

²⁰⁷ 1 A COOGAN, HOGAN & VAGTS § 17.05(1), at 1794 n.23; 2 GILMORE § 28.4, at 758-59; Kripke, *supra* note 12, at 50; Osborne, *supra* note 59, § 218, at 410.

²⁰⁸ 2 GILMORE § 28.5, at 766.

²⁰⁹ *Id.* § 28.7, at 771.

²¹⁰ See, e.g., Layne Central Co. v. Gulf Coast Ice Co., 171 Miss. 94, 157 So. 84 (1934), noted in 7 Miss. L.J. 438 (1935); John Van Range Co. v. Allen, 7 So. 499 (Miss. 1890); cf. Polle v. Rouse, 73 Miss. 713, 19 So. 482 (1896) (tenants' "fixtures"). These cases are discussed in Adams, *An Historical Perspective of the Mississippi Law Regarding Fixtures Prior to the Introduction of the Uniform Commercial Code*, 46 Miss. L.J. 907, 958-66 (1975).

could, of course, be eliminated completely by requiring the secured party to give actual notification of his security interest to holders of preexisting real estate interests to qualify for priority. Against that gain for mortgagees, however, must be balanced the burden that would be placed on conditional sellers of goods. For example, the cost of making a real estate record search to identify prior interests would be prohibitive unless the goods sold were of large value.²¹¹ Mississippi's version of section 9-313(2), however, goes even further in providing that nothing but the prior mortgagee's written consent to subordinate his interest to that of the secured party will entitle the security interest to priority. Such an extreme rule cannot be justified.

Third, the adoption of this rule completely ignores the relative equities of the competing parties in the typical 9-313(2) situation. It is indeed difficult to defend this rule in terms of striking a reasonable balance between the competing interests involved.²¹² Concededly, the rule does confer some benefits upon real estate mortgagees which Mr. Pfeiler failed to mention. These benefits may be cited as additional justifications for the rule as it appears in the Mississippi UCC. The uncertainty of the rule of *Moore v. Bay*²¹³ is eliminated, although it could have been eliminated by less drastic measures.²¹⁴ Moreover, the mortgagees are protected against the problem of "waste."²¹⁵ Again, however, the rule transgresses the bounds of reason in meeting the problem.²¹⁶ Actually, this problem may not be serious enough to require any modification of the Official Text.²¹⁷ The rule clearly enables real estate mortgagees to pressure their debtors to apply to them for new credit to finance improvements. The wisdom of adopting a statutory rule unnecessary for any purpose other than discouraging chattel financing in favor of real estate financing is indeed dubious.

An incidental effect of Mississippi's reversal of the Official Text's first priority rule is that it probably resolves the problem of "contractors' fixtures."²¹⁸ Since the Mississippi Code gives conditional sellers of

²¹¹ See 2 GILMORE § 30.6, at 834-36 (discussing a similar proposal for modification of section 9-313(4)(c) of the 1962 Official Text).

²¹² See note 28 *supra*.

²¹³ 284 U.S. 4 (1931), discussed in part I D 5 *supra*.

²¹⁴ A requirement that the security interest be perfected in order to qualify for priority is sufficient. See discussion of 1972 Official Text in note 313 *infra*.

²¹⁵ See part I D 6 *supra*.

²¹⁶ The prior mortgagee is granted an absolute priority over the fixture supplier, regardless of the amount of damage, if any, to the mortgagee's security by removal of the old fixture. A more modest remedy, adequate to protect the mortgagee, would be to allow him a first lien on the replacement fixture to the extent of the diminution in value of the realty by reason of removal of the old fixture. See OSBORNE, *supra* note 59, § 218, at 414 n.38.

²¹⁷ The question is one on which opinions differ. See part I D *supra*.

²¹⁸ See part I D 3 *supra*.

goods which become fixtures no priority over any preexisting interests in the real estate, the landowner in the "contractors' fixtures" situation, as well as any prior real estate mortgagees, appear to be fully protected against the danger to which the Official Text would expose him. Though resolution of the problem is certainly desirable, that objective can be achieved without denying priority to purchase money security interests in all cases.²¹⁹

Finally, the rule of Mississippi's section 9-313(2) may have a boom-erang effect in practice. Its immediate impact is to discourage suppliers of goods which will, or may, become fixtures from supplying such goods on credit. Further, it discourages loans to enable acquisition of such goods with the goods serving as security. Initially working to the disadvantage of landowners who desire to improve their land, this may also harm those who hold mortgages on such lands. If landowners are unable to obtain the most productive use of their lands, the likelihood of their default on mortgage obligations is increased.

2. Subsequently Arising Real Estate Interests

The third priority rule of the Official Text—that interests in fixtures generally take priority over all subsequently arising real estate interests²²⁰—has a somewhat uncertain status in Mississippi. Subsection (3) of Mississippi's section 9-313²²¹ follows the Official Text in stating the general rule for cases where a security interest attaches to goods after they become fixtures. Where, however, the security interest attaches to goods before they become fixtures, subsection (2)²²² applies. Taken literally, this subsection subordinates the pre-affixation security interest even to subsequently arising real estate interests whose owners do not agree to subordination in writing.

Nevertheless, the third priority rule probably is intended to be preserved in each of those cases. In this respect, it is difficult to see any reason for distinguishing security interests attaching to goods before they become fixtures from those attaching afterwards. This is particularly true when the result is to give the latter type of security interest greater protection than the former. Subsection (2)'s reference to subsec-

²¹⁹ One solution would be to deny priority to a purchase money security interest in fixtures on land in which the debtor has no interest of record. See discussion of 1972 Official Text accompanying notes 311 through 314 *infra*. Another would be that suggested by Professor Kripke. See note 132 *supra*. Only three other states have modified section 9-313(2) in a comparable manner. See FLA. STAT. ANN. § 679.9-313(2) (Supp. 1975); IDAHO CODE § 28-9-313(2) (1967); OHIO REV. CODE ANN. § 1309.32(B) (Anderson Supp. 1974).

²²⁰ 1962 OFFICIAL TEXT WITH COMMENTS § 9-313(3).

²²¹ MISS. CODE ANN. § 75-9-313(3) (1972).

²²² *Id.* § 75-9-313(2).

tion (4A)²²³ suggests a general rule that security interests will prevail over subsequently arising real estate interests,²²⁴ and subsection (4A)'s reference to subsection (2) strengthens that implication. Moreover, in proposing the wording of Mississippi's subsection (2), Mr. Pfeiler seemingly assumed that the secured party would generally have priority over subsequently-arising real estate interests.²²⁵

3. The Exceptional Rules

Subsection (4A) of Mississippi's section 9-313²²⁶ has the deceptive appearance of paralleling subsection (4) of the Official Text. Close examination, however, reveals a number of intriguing differences. For example, the Mississippi version completely defines each of the three classes of persons protected by the subsection in separate paragraphs. In contrast, the Official Text's consolidation of some of its definitional elements in a final clause applicable to all three classes is less clear and requires a careful reading. Other Mississippi variations are, however, of more questionable clarity and desirability.

a. "*Perfected Against the Real Estate*" and "*Actual Notice*"

The use of the phrase "perfected against the real estate" in place of the single word "perfected" is largely unnecessary.²²⁷

The term "actual notice" has been substituted for "knowledge" throughout the subsection. Thus, for a subsequent purchaser of an interest in the real estate or a creditor subsequently acquiring a lien on the

²²³ *Id.* § 75-9-313(4A) provides:

The security interests described in subsections (2) and (3) do not take priority over

(a) a subsequent purchaser for value of any interest in the real estate if the subsequent purchase is made without actual notice of the security interest and before such security interest is perfected against the real estate; or

(b) a creditor with a lien on the real estate subsequently obtained by judicial proceedings if the lien by judicial proceedings is obtained without actual notice of the security interest and before such security interest is perfected against the real estate; or

(c) a creditor with a prior encumbrance of record on the real estate to the extent that he makes subsequent advances, if the subsequent advance under the prior encumbrance is made or contracted for without actual notice of the security interest or before such security interest is perfected against the real estate. A purchaser of the real estate at a foreclosure sale is a subsequent purchaser within this section.

²²⁴ Two of the three classes of persons protected by subsection (4A) are persons subsequently acquiring interests in the real estate.

²²⁵ See Pfeiler, *supra* note 151, at 209.

²²⁶ MISS. CODE ANN. § 75-9-313(4A).

²²⁷ See part II A 4 *supra*.

real estate by judicial proceedings to prevail over a security interest in fixtures, he must purchase or acquire his lien "without actual notice of the security interest" and before it is perfected against the real estate; and a prior encumbrancer making or contracting for a subsequent advance must do so either "without actual notice" of the security interest or before it is "perfected against the real estate."

This innovation was suggested by Mr. Pfeiler on the theory that "'actual notice' . . . has precise legal meaning" and its substitution for "knowledge" would remove "any uncertainty as to whether a filing or recording of a security interest would impart 'knowledge' thereof to persons having an interest in the real estate."²²⁸

The idea that "actual notice" is more precise than "knowledge" strikes this writer as strange. While some conveyancers may agree with that notion, the term "actual notice" certainly has been given varying interpretations, even in real estate law.²²⁹ Moreover, the Official Text defines "knowledge" as "actual knowledge."²³⁰ "Actual notice," however, is not defined by the Code. The fact that Mississippi has rejected the wording of the Official Text suggests a legislative intent to change the operation of the rules involved. If this is so, given the Code definition of "knowledge," the change would have to be in the direction of treating persons as having "actual notice" when they do not have actual knowledge. This is, of course, not what Mr. Pfeiler intended, and it would seem that this particular revision is more likely to trouble persons acquiring interests in real estate than help them.

b. Shift from Conjunctive to Disjunctive in 9-313(4A)

Apparently, Mr. Pfeiler's main concern in modifying section 9-313(4) was to change the wording of paragraph (c) relating to future

²²⁸ Pfeiler, *supra* note 151, at 210.

²²⁹ See OSBORNE, *supra* note 59, § 206, at 357-59. In *Sun Oil Co. v. Broadhead*, 323 So. 2d 95 (Miss. 1975), the Mississippi Supreme Court found that a lessee of land was not an "innocent purchaser for value" because of his knowledge of facts which should have led to further investigation. The court quoted from *Beauchamp v. McLaughlin*, 200 Miss. 83, 94, 25 So. 2d 771, 775 (1946):

Where a purchaser has knowledge of circumstances such as would put a prudent person acting in good faith on inquiry, he is chargeable with *actual notice* of the facts the inquiry would have disclosed.

323 So. 2d at 98. (emphasis added). See also *King Lumber Indus. v. Cain*, 209 So. 2d 844, 846 (Miss. 1968), where the court quoted with approval the following passage from 66 C.J.S. *Notice* § 5, at 848 (1950):

[A]ctual notice often means knowledge of facts and circumstances sufficiently pertinent in character to enable reasonably prudent persons to investigate and ascertain as to the ultimate facts, and it may include knowledge of all facts which a reasonable inquiry would have disclosed.

²³⁰ 1962 OFFICIAL TEXT WITH COMMENTS § 1-201(25).

advances made under a "prior encumbrance of record on the real estate."²³¹ To assure that open-end mortgagees would not have to make title searches before making additional advances, Mr. Pfeiler proposed to modify the Official Text by simply changing "and" to "or" in subsection (4)(c).²³² Thus, the rule as to future advances would read:

The security interests described in subsections (2) and (3) do not take priority over . . . a creditor with a prior encumbrance of record on the real estate to the extent that he makes subsequent advances, if the subsequent advance under the prior encumbrance is made or contracted for without actual notice of the security interest or [instead of "and"] before such security interest is perfected against the real estate. [By making this substitution] the mere perfection of a security interest would not give it priority over a subsequent advance made pursuant to a properly drafted prior encumbrance if such advances were made without actual notice of the security interest (and within the limits stated in the prior encumbrance). The pre-Code majority rule, that an encumbrancer with a lien of record is not deemed to have constructive notice by reason of the subsequent recording of a lien on the property, thus is reinstated.²³³

Mr. Pfeiler's article did not propose any similar change in the wording of paragraphs (a) and (b) of 9-313(4) because "it does not work the same

²³¹ Mr. Pfeiler viewed the Official Text treatment of future advances as a threat to the effectiveness of "open-end" provisions in real estate mortgages. He explained:

In the great majority of jurisdictions, additional optional advances which are made within the limits of and pursuant to a properly drafted open-end mortgage provision, takes priority over private intervening liens if made without notice of such liens In these states, mortgage lenders can depend upon the recording laws to give notice to the world of the mortgage provisions, including the extent to which they made advances, and can make open-end advances without conducting a title search for intervening private liens

Under the Uniform Commercial Code, however, the lien of such an advance would relate back to a prior recorded mortgage which, by reason of subsection (2) of section 9-313, is inferior to any intervening security interest which had attached and become part of the real estate under the law of fixtures. Consequently, the lien of the open-end advance could not be superior to any intervening security interest on the theory of "relation back." It probably would, however, be superior to any intervening security interest which had not been perfected by filing . . . because subsections (3) and (4) of section 9-313 require such security interests to be perfected if they are to be good against subsequent interests in the real estate. However, in order for the open-end mortgagee to be sure that there would be no intervening security interest which would take priority over the additional advance, it would be necessary for such mortgagee to make a title search before making the advance, and even this has its risks.

Pfeiler, *supra* note 151, at 207-08.

²³² *Id.* at 212.

²³³ *Id.* at 210.

hardships on subsequent purchasers of the real estate interests and subsequent judgment creditors to require that they acquire their interests both without actual notice of the security interest and before the security is perfected against the real estate. Such lien holders expect to be subject to any prior liens of record."²³⁴ The Mississippi UCC conforms to the wording suggested by Mr. Pfeiler.

In appraising this alteration of the Official Text, one's first reaction is to wonder why Mr. Pfeiler did not simply propose deletion of paragraph (c) from section 9-313(4). Under subsections (2) and (3), as enacted in Mississippi, no Article 9 security interest can take precedence over a preexisting real estate interest without the consent of the holder of that interest. Therefore, the doctrine of "relation back" would adequately assure open-end mortgagees priority for future advances over intervening security interests, thus abrogating the need for subsection (4)(c). It is conceivable, however, that Mr. Pfeiler preferred not to rely on an uncodified doctrine of "relation back" and preferred to have 9-313(4)(c) serve as a reinforcement of the open-end mortgagee's position.

Further, the alteration apparently creates a curious anomaly. Besides relieving the real estate mortgagee of the need to make a title search before making future advances, the revision also appears to grant him priority for future advances even if they are made with actual notice of an intervening security interest if the secured party has not filed. This exceeds what Mr. Pfeiler asserted to be the pre-Code law²³⁵ and his article does not attempt to justify the innovation.

The most basic criticism of this alteration of the Official Text is that it assumes that optional advances made under an open-end real estate mortgage should have priority over both perfected and unperfected intervening fixture security interests so long as the mortgagee is unaware of such interests when he makes his advances. The benefit to the mortgagee is evident, but it should be weighed against the resulting

²³⁴ *Id.* at 209.

²³⁵ See note 231 *supra*. The pre-Code law with regard to the priority of optional advances has been found by most writers to be divided into a "majority" and a "minority" rule. The majority rule is that the mortgagee will have priority over an intervening encumbrancer if he makes the advance without actual knowledge of the encumbrance, even though such encumbrance has been recorded. Under the minority rule, however, either actual knowledge of the intervening encumbrance or constructive notice from the public record will defeat the mortgagee's priority for his future advance. 2 GILMORE § 35.4 at 927-28; OSBORNE, *supra* note 59, §§ 118-19; Comment, *supra* note 68, at 437-39. That the "majority" and "minority" are firmly established has been doubted. See 2 GILMORE § 35.4, at 929. Mississippi has been identified as following a third rule: The mortgagee has absolute priority even for optional advances. *Id.* § 35.4, at 927 n.7; Comment, *supra* note 68, at 438. An old decision can be so read, *Witcainski v. Everman*, 31 Miss. 841 (1876), but the more recent case of *North v. J.W. McClintock, Inc.*, 208 Miss. 289, 44 So. 2d 412 (1950), adopts the "majority" rule.

detriment to fixture secured parties. The practical effect of this rule is to warn both persons considering making conditional sales of goods that will or may become fixtures and those considering lending money on the security of such goods not to do so without first making a real estate title search. The cost of a title search, however, would normally discourage the making of such conditional sales and loans. The benefit to the real estate mortgagee is his assurance of a first lien, to the extent of all advances, on all of the debtor's property which, under the law of fixtures, may be considered to have become part of the realty. In many cases, however, the fixtures subject to security interests will represent only a minor fraction of the total value of the real estate. Further, the obligations secured by the fixtures will normally be liquidated before any mortgage foreclosure becomes necessary. Therefore, the inhibition of chattel financing entailed by Mississippi's version of subsection (4)(c) seems an extraordinarily heavy price for the peace of mind gained by real estate mortgagees.²³⁶

The Mississippi modifications of 9-313(2) and 9-313(4)(c) give fairly complete protection to construction mortgagees²³⁷ and may, to that extent, be considered improvements upon the Official Text. However, these provisions favor all mortgagees whose mortgages include future advance clauses and, it is submitted, go too far.

c. Purchase at Foreclosure Sale as "Purchase"

Mississippi's treatment of real estate foreclosure sale purchasers differs from that of the Official Text. Though both provide that such a purchaser is to be treated as a "purchaser" for purposes of subsection (4), the Mississippi statute deletes the exception of "an encumbrancer purchasing at his own foreclosure sale." This deletion, proposed without explanation by Mr. Pfeiler,²³⁸ was apparently intended to authorize a real estate mortgagee to improve his position by foreclosing and buying the property from himself at the foreclosure sale.

C. The Removability Rule

Subsection (5) of section 9-312 in the 1962 Official Text, authorizing a secured party who has priority over all real estate interests to remove

²³⁶ See REVIEW COMMITTEE FINAL REPORT, *supra* note 7, at 204-05, item A-17, which is limited to a defense of a preference for purchase money security interests but seems equally applicable to non-purchase money security interests intervening between the execution of a real estate mortgage and the making of an optional advance.

²³⁷ Compare discussion of the status of construction mortgagees under the 1962 Official Text at text accompanying note 59 *supra*.

²³⁸ Pfeiler, *supra* note 151, at 212.

his fixture collateral from the land in the event of the debtor's default,²³⁹ does not appear in Mississippi's UCC. Implicitly advocating its deletion,²⁴⁰ Mr. Pfeiler criticized subsection (5) on the basis that even though the removal of fixtures would likely diminish the value of the real estate beyond the sum of the value of the goods removed plus the physical damage to the land caused by the removal, subsection (5) requires reimbursement of realty interests only to the extent of such physical damage. Thus, the going value of the property might be injured without adequate compensation being given to real estate mortgagees.²⁴¹ This modification makes little sense considering that the priority rules make it extraordinarily difficult for a fixtures secured party to gain any priority over real estate interests. Apparently, if the secured party somehow manages to gain priority over all persons interested in the real estate, he must nevertheless leave his collateral in place despite the debtor's default.

This result presumably protects persons acquiring or expanding interests in the realty after the goods have become fixtures subject to an Article 9 security interest who do not qualify for protection under subsection (4A): subsequent purchasers of interests in the real estate who purchase with actual notice of the security interest or after its perfection; subsequent lien creditors who acquire their liens with actual notice of the security interest or after its perfection; and open-end mortgagees who make subsequent advances both with actual notice of the security interest and after it has been perfected.²⁴² Why these persons should be guaranteed protection against diminution of the going value of the property is not apparent.

The deletion of subsection (5) from section 9-313, if construed as forbidding removal of fixtures to enforce an Article 9 security interest, renders the priority rules of section 9-313 useless. Theoretically, the secured party could still foreclose and sell the collateral, but since the goods cannot be removed from the land, a foreclosure sale is not likely to attract many bidders or bids of any size.

It may not be necessary, however, to place so dismal a construction on the Mississippi Code. Although subsection (5) of section 9-313 has

²³⁹ See text accompanying note 72 *supra*.

²⁴⁰ See Pfeiler, *supra* note 151, at 206 (criticizing subsection (5)), 211-12 (proposing amendment of section 9-313).

²⁴¹ *Id.* at 206.

²⁴² A possible reading is that it also protects those holders of prior real estate interests who have consented in writing to subordinate their interests or have disclaimed interest in the goods as fixtures. Subsections (2) and (3) indicate that the secured party does have priority over them. An express subordination agreement or disclaimer of interest, however, should be construed as consenting to the secured party's removal of the collateral on the debtor's default.

been deleted, section 9-503 of the Official Text is included²⁴³ without change. Its first sentence provides that "unless otherwise agreed a secured party has on default the right to take possession of the collateral."²⁴⁴ This could be construed as authorizing the secured party to remove fixtures collateral from the land when the debtor defaults without compensating anyone for resultant damage to the land. One cannot be sanguine about this interpretation. The legislative rejection of section 9-313(5) suggests an intent to make an exception in fixtures cases to the general rule stated by the first sentence of section 9-503.

More promising, perhaps, is another provision in section 9-503: "Without removal a secured party may render equipment unusable and may dispose of collateral on the debtor's premises under section 9-504."²⁴⁵ It is unnecessary to conclude that the legislature, by omitting section 9-313(5), intended to negate this provision. Indeed, the mere presence of section 9-313's elaborate priority rules in the Mississippi Code warrants reading the default provisions to give a secured party some practical means of enforcement when he has priority over all real estate interests.

Section 9-504, enacted in Mississippi as it appears in the Official Text,²⁴⁶ authorizes the sale, lease, or other disposition of collateral after default and includes the following provision:

When collateral is disposed of by a secured party after default, the disposition transfers to a purchaser for value all of the debtor's rights therein, discharges the security interest under which it is made and any security interest or lien subordinate thereto.²⁴⁷

Significantly, "lien" is not defined in the Code. Sections 9-503 and 9-504 might be read to mean that if the secured party sells his fixtures collateral, without removing it from the land, his buyer will take the property free of all liens on the land acquired by judicial proceedings and all mortgages and deeds of trust on the land over which the security interest had priority under section 9-313. If so, the buyer's right to remove the fixtures despite objection from these "lien" holders may be deemed to follow. Even so, the term "lien" probably could not be stretched to include the interest of a buyer of the land. Presumably, such a buyer could prevent removal of the fixtures even if his interest was subordinate to that of the secured party.

Further speculation concerning the right of removal under the Mis-

²⁴³ MISS. CODE ANN. § 75-9-503 (1972).

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ 1972 OFFICIAL TEXT WITH COMMENTS § 9-504.

²⁴⁷ MISS. CODE ANN. § 75-9-504(4) (1972).

Mississippi UCC does not seem worthwhile. Until the Mississippi Supreme Court addresses these matters, the most optimistic advice counsel could give a client with a security interest in fixtures is that if his interest conflicts with that of anyone with an interest in the real estate, other than the debtor, his interest is of dubious worth.

D. The Meaning of "Fixtures"

1. Significance of the Question

In light of the pessimistic conclusion reached in the preceding discussion, it may seem pointless to struggle with the meaning of the term "fixtures" under the Mississippi UCC. Yet, such a discussion is anything but pointless. If the secured party can establish that the goods which serve as his collateral are purely personal property rather than fixtures, he will be able to entirely avoid both the priority rules and Mississippi's implicit rule against removal. Moreover, classification of the goods controls the manner in which he can perfect his security interest. The classification is crucial since perfection is a key to lien priority not only over some real estate interests if the goods are fixtures, but also over conflicting claims to the goods whether or not they are classified as fixtures. Additionally, the secured party will want to ensure that his security interest will survive any attack by the debtor's trustee in bankruptcy. This too is likely to depend on whether the security interest has been perfected, and the way it can be perfected will again depend on whether the collateral is fixtures.

Since an Article 9 security interest can exist in goods whether or not they are fixtures, it follows that another Article 9 security interest can be created in the same goods. A contest may arise between two such secured parties. If so, section 9-313's rules of priority will not resolve the contest since neither involves an interest "in the real estate" within the meaning of that section. Priority will be governed by other sections of the Code, such as 9-301 and 9-312. Often these rules turn on the order or manner of perfection of the respective security interests; and the time and manner by which perfection of security interests can be achieved will depend, at least in part, on whether the collateral is fixtures.

Suppose a large drill press is sold by *A* to *B* under a conditional sales contract, and *B* installs the machine in his factory on land he owns in Oxford, Lafayette County, Mississippi. A month later, *B* executes a chattel mortgage to *C* on all the equipment in his factory as security for a loan. *B* defaults on both obligations. No one else has any interest in the land or the drill press. The resulting problem is not whether either secured party has priority over persons with interests in the land who claim the drill press as an accession, nor whether there is a right of

removal against such persons, but, rather, which Article 9 security interest has priority over the other.²⁴⁸

Assume that *A*, before delivering the press to *B*, filed financing statements with the Mississippi Secretary of State and the Chancery Clerk of Lafayette County, and that the financing statements complied with the formal requirements of section 9-402 of the Mississippi UCC.²⁴⁹ The statement did not include any description of *B*'s land nor show him as the record owner. Assume further that *C* filed a financing statement on the day he received his chattel mortgage with the Chancery Clerk of Lafayette County in a form appropriate for filing as to fixtures. *A* would probably rely on the priority rule of section 9-312(4):

A purchase money security interest in collateral other than inventory has priority over a conflicting security interest in the same collateral if the purchase money security interest is perfected at the time the debtor receives possession of the collateral or within ten days thereafter.²⁵⁰

His position is strong if the machine did not become a fixture when installed in *B*'s factory. As to nonfixture collateral of the industrial equipment type, his filing was proper both in form and place of filing,²⁵¹ and he achieved perfection before the debtor received possession of the collateral.

If, however, the drill press did become a fixture, *A*'s security interest would not have been perfected at all. The only way to perfect a security interest in fixtures is to file a financing statement containing a description of the land concerned and the name of the record owner or record lessee²⁵² with the chancery clerk of the county in which a mortgage on the land would be recorded.²⁵³ While the office of the Chancery Clerk of Lafayette County would be the proper place to file,²⁵⁴ *A*'s filing there was not in the proper form for a fixture filing. *C*'s filing, on the other hand, would have perfected his security interest in the drill press.

Which priority rule would then apply? It would be the one implied

²⁴⁸ The debtor, *B*, may have an interest in the goods as realty, but each secured party has priority over him by virtue of the security agreements. Right of removal may be provided by express provisions of the security agreements; however, if not, it is conferred by section 9-503 of the Code. The implied negation of the right of removal seemingly implied by the omission of section 9-313(5) should not operate in favor of the debtor. The obvious purpose of the section is to deal with the rights and immunities of persons other than the debtor who have interests in the real estate. If the goods are not fixtures, section 9-313 will not apply at all.

²⁴⁹ MISS. CODE ANN. § 75-9-402(1) (1972).

²⁵⁰ *Id.* § 75-9-312(4).

²⁵¹ *See id.* §§ 75-9-401(1)(c), -402(1).

²⁵² *Id.* § 75-9-402(1).

²⁵³ *Id.* § 75-9-401(1)(b).

²⁵⁴ *See id.* §§ 75-9-401(1)(b), 89-5-1, -3.

by section 9-312(5):²⁵⁵ A perfected security interest has priority over an unperfected one, regardless of the order of their attachment. Similar problems could arise between the holder of an Article 9 security interest and a person who purchased the collateral from the debtor.²⁵⁶

Although the above-mentioned types of disputes may rarely arise, a contest with the debtor's trustee in bankruptcy is a very real possibility. Of the cases litigating the removal of "fixtures" under the UCC, many have involved a trustee's resistance to a secured creditor's claim to goods owned by the debtor at the time of bankruptcy.²⁵⁷

While the trustee might invoke various Bankruptcy Act provisions, for present purposes it will suffice to consider his position as a hypothetical lien creditor under section 70c.²⁵⁸ By virtue of that provision, the trustee is treated as a creditor who acquired a lien by judicial proceedings on all property owned by the bankrupt as of the date of bankruptcy, with whatever rights such a creditor would have under local law. Under the Mississippi UCC, a creditor who, by judicial proceedings, acquires a lien on collateral subject to an unperfected security interest takes priority if he was "without knowledge" of the security interest when he acquired his lien.²⁵⁹ Further, a creditor who acquires a lien on land by judicial proceedings has priority over an unperfected security interest in fixtures on the land if he was without "actual notice" of the security interest when he acquired his lien.²⁶⁰ The "without actual notice" and

²⁵⁵ *Id.* § 75-9-312(5). This subsection provides:

In all cases not governed by other rules stated in the section (including cases of purchase money security interests which do not qualify for the special priorities set forth in subsections (3) and (4) of this section), priority between conflicting security interests in the same collateral shall be determined as follows: (a) in the order of filing if both are perfected by filing, regardless of which security interest attached first under Section 9-204(1) [§ 75-9-204(1)] and whether it attached before or after filing; (b) in the order of perfection if both are not perfected by filing, regardless of which security interest attached first under Section 9-204(1) [§ 75-9-204(1)] and, in the case of a filed security interest, whether it attached before or after filing; and (c) in the order of attachment under Section 9-204(1) [§ 75-9-204(1)] so long as neither is perfected.

While the subsection does not say that an unperfected security interest is subordinate to a perfected one, the rule seems implicit, particularly in paragraph (b). *See* 1962 OFFICIAL TEXT WITH COMMENTS § 9-312, Comment 4.

²⁵⁶ *See* MISS. CODE ANN. § 75-9-301(1)(c) (1972).

²⁵⁷ *See, e.g., In re Shepard*, 14 UCC REP. SERV. 249 (W.D. Va. 1974); *In re Sutphin*, 13 UCC REP. SERV. 557 (W.D. Va. 1973); *In re Kahl*, 10 UCC REP. SERV. 1322 (W.D. Wis. 1972); *In re Factory Homes Corp.*, 333 F. Supp. 126 (W.D. Ark. 1971); *In re Regency Furniture Inc.*, 7 UCC REP. SERV. 1384 (E.D. Tenn. 1970).

²⁵⁸ 11 U.S.C. § 110c (1970).

²⁵⁹ MISS. CODE ANN. § 75-9-301(1)(b), (3) (1972).

²⁶⁰ *Id.* § 75-9-313 (4A)(b).

"without knowledge" requirements of the Code may be ineffective against a trustee in bankruptcy.²⁶¹ In any event, the critical question is likely to be whether the security interest was perfected at the time of bankruptcy. Since both the form of the financing statement and the place of filing will depend on the classification of the collateral, the secured party will have had to determine whether the goods were or would become fixtures in order to perfect his security interest therein. In the preceding hypothetical, if *B* had gone into bankruptcy and *A* and *C* were asserting secured claims against the trustee, the trustee would very likely be able to defeat *A*'s claim but not *C*'s if the goods were fixtures. The reverse would be true if the goods were not fixtures.

2. Answering the Question

For purposes of applying Mississippi's Article 9, determining whether particular goods are fixtures is no easier than in other states.²⁶² In fact, it may be more difficult. Although subsection (1) of section 9-313 of the 1962 Official Text—the principal guide to the meaning of "fixtures"—is reproduced in the Mississippi UCC without significant variation, the omission of subsection (5) may increase the difficulty of discerning the meaning of subsection (1).²⁶³

It is evident, however, that the Mississippi UCC, like the Official Text,²⁶⁴ contemplates a three-way classification of property: (1) pure realty, which cannot be the subject of an Article 9 security interest; (2) pure personalty, which cannot be the subject of an interest arising under real property law; and (3) hybrid or mixed property, which is sufficiently personalty to be subject to an Article 9 security interest and sufficiently realty to be subject to interests arising under real estate law. The rules governing perfection and priorities of security interests in "fixtures" apply to property of the third class only. Despite the omission of subsection (5) from Mississippi's section 9-313, it is believed that the "fixtures" concept of this state's Code does not differ significantly from that of the Official Text.

As previously noted,²⁶⁵ after it has been decided that the goods in question are not pure realty, the Code provides that the "law of this State other than this act" shall determine whether the goods are pure personalty or "fixtures." The guidance needed from that law concerns

²⁶¹ *In re Callaghan Motor, Inc.*, 396 F. Supp. 785 (D.N.J. 1975) and cases cited therein.

²⁶² See part I A *supra*.

²⁶³ See note 15 *supra*.

²⁶⁴ See text accompanying note 12 *supra*.

²⁶⁵ See note 11 *supra*.

whether the goods have acquired enough real property characteristics so one with an interest in the land would acquire an interest in the goods as an accession to the land. It is therefore appropriate to consider what sort of guidance Mississippi's non-Code law of "fixtures" offers and how that law should be used.

Mississippi's pre-Code law of "fixtures" was almost entirely case law, and the court employed the term "fixtures" in a different sense than does the Code.²⁶⁶ Only two classes of property—real and personal—were recognized, and the term "fixtures" was employed to designate goods which had once been personal property but which had become real property by affixation to land. It is implicit in this classification that there can never be a conflict between a personal property interest and a real property interest in the same goods; the goods must be either real or personal property. Contests between creditors claiming an interest in goods as personal property and those claiming an interest in the goods as real property were resolved by determining whether the goods had become "fixtures," real property, or had remained personal property despite their association with land.²⁶⁷

Discussions in these cases were often couched in terms of title to the goods, rather than whether they were real or personal property. It was, however, apparently assumed that if the goods became "fixtures," they not only became real property but also lost all personalty characteristics and the interests in the land attached to them.²⁶⁸

Since the range of possible factual disputes under the Code's priority and perfection rules were handled in pre-Code cases by use of a *different legal theory* of "fixtures," these cases cannot be drawn upon by simply comparing their facts with those of a Code case and noting their holding that the goods in question were or were not "fixtures." They must be selected for guidance as to the narrow question the Code leaves to non-Code law: whether the goods acquired a sufficient real property character so that one with an interest in the land *could* have an interest in them as accessions to the land. As has been previously suggested, a useful approach to the common law cases is to ask a hypo-

²⁶⁶ See Adams, *supra* note 210.

²⁶⁷ See, e.g., Layne Central Co. v. Gulf Coast Ice Co., 171 Miss. 94, 157 So. 84 (1934) (conditional seller versus former mortgagee of the land who had bought the land at his foreclosure sale); Polle v. Rouse, 73 Miss. 713, 19 So. 482 (1896) (conditional seller versus mortgagee of the land); Armstrong v. Guenther, 67 Miss. 698, 7 So. 499 (1890) (same); Duke v. Shackelford, 56 Miss. 552 (1879) (conditional seller versus buyer of the land).

²⁶⁸ See Duke v. Shackelford, 56 Miss. 552 (1879), where the conditional sales agreement provided that title to the goods should remain in the seller until the price was fixed and the agreement was held effective against buyers of the land. The court said that "the agreement of the parties shows that the property, as between them, was to remain personalty, though annexed to the freehold." *Id.* at 555.

thetical question: If no Article 9 security interest existed, would an interest in the real estate extend to the goods as well?

To illustrate, suppose *A* owns a farm and contracts in writing with *B* to have *B* install the equipment and fittings necessary to enable *A* to use a well on the farm to irrigate his fields. The contract stipulates that *B* is to retain title to his installations to secure his right to their price and that the goods are to remain personal property until the price is finally paid. *A* agrees to pay the price in installments over a period of three years. *A*'s land is already subject to a mortgage in favor of *C*. *B* proceeds to install the irrigation equipment on *A*'s farm. Thereafter, *C* forecloses his mortgage and buys the land at the foreclosure sale. *A* defaults on his contract with *B*, and *B* seeks to repossess the goods he installed on the farm. *C* resists *B*'s claim, contending the goods became subject to his mortgage upon installation and that, by reason of his purchase of the land at the foreclosure sale, they have become his property.

Assuming that the goods in question had not fully become real property under Mississippi's section 9-313(1), *B* could have a security interest in the goods; presumably, he acquired such an interest by virtue of his written contract with *A* and his performance of that contract. *C* would likely claim priority over *B* under section 9-313(2) since *C* had executed no subordination agreement. *B* may argue, however, that since the goods in question did not become fixtures the rule of 9-313(2) is inapplicable. Mississippi's non-Code law governs the validity of this contention.

The facts of one pre-Code case, *Layne Central Co. v. Gulf Coast Ice Co.*,²⁶⁹ are virtually identical to those of this hypothetical. There, the holding favored the conditional seller on the ground that the well equipment remained personal property by force of the terms of the conditional sale and, therefore, did not become subject to the real estate mortgage. But *Layne Central* is not valid precedent for finding that the goods involved in the hypothetical case would not be "fixtures" under the Code. The *Layne Central* case was decided on the *either-or* basis of pre-Code fixtures cases: either the goods remained personal property or they became real property, and the classification determined which claimant should prevail. Under the Code, goods may be both real and personal property. When real and personal interests conflict, the priority rules of 9-313(2), (3), and (4A) determine which is entitled to preference.

The unanswered question is whether the goods acquired a sufficient real property character to become subject to *C*'s real estate mortgage or whether they remained purely personal property. Thus the search for

²⁶⁹ 171 Miss. 94, 157 So. 84 (1934).

helpful non-Code law should be made by posing the following hypothetical question: If there were no Article 9 security interest involved, would the real estate mortgagee have an interest in the goods upon their installation on the land? Consequently, cases indicating whether A, as owner of the land and the goods, could have successfully resisted C's claim to them under his mortgage would be instructive.

While no Mississippi cases have dealt with the question of well equipment, the reasoning of at least three cases²⁷⁰ supports a conclusion that the goods would, as fixtures, become subject to the mortgage as between mortgagor and mortgagee. In these cases, the classification as fixtures rested primarily on findings that the goods were installed on the land by the owner of both and were of such nature as to make the land more useful for the purposes to which it was devoted. From this, intent to make the goods a permanent addition to the land could be inferred. Through such analysis, the goods in the hypothetical should be classified as "fixtures" under the Mississippi UCC. Section 9-313(2) would then give the mortgagee priority over the conditional seller. Under the Official Text, however, the result would be reversed and would be in accord with the *Layne Central* case since the purchase money security interest would have priority over the interest of the preexisting mortgagee under section 9-313(2).

III. THE 1972 OFFICIAL TEXT

The 1972 Official Text of the UCC incorporates the changes approved by the Code's sponsoring agencies in 1971.²⁷¹ Insofar as security interests in fixtures are concerned, it differs considerably from the 1962 Official Text in both form and substance. The changes were designed to (1) eliminate ambiguities within the 1962 Text; (2) resolve problems not dealt with, or inadequately dealt with, by that text; and (3) meet some of the criticisms leveled at the substantive operation of the 1962 Text by the real estate bar and others which had led to a proliferation of nonuniform departures from the 1962 Official Text. It was hoped that these revisions would produce a generally acceptable package and thus promote the objective of uniform legislation throughout the country.²⁷² Perhaps inevitably, the changes, while going far toward achieving their purposes, have introduced new problems of interpretation and provided new grounds for criticism. The following discussion compares the 1972

²⁷⁰ *M.L. Virden Lumber Co. v. Sherrod*, 167 Miss. 297, 139 So. 813 (1932); *Frederick v. Smith*, 147 Miss. 437, 111 So. 847 (1927); *Tate v. Blackburne*, 48 Miss. 1 (1873).

²⁷¹ See notes 6 through 8 and accompanying text *supra*.

²⁷² See 1972 OFFICIAL TEXT WITH COMMENTS §§ 9-313, -401, -402, Appendix, Reasons for 1972 Change; Funk, *supra* note 71.

Official Text with its 1962 counterpart. Additionally, the effect of conforming Mississippi's Commercial Code to the 1972 Official Text will be considered in part IV of this article.

A. *The Meaning of "Fixtures"*

During the early drafting stages of the 1972 Amendments,²⁷³ the draftsmen proposed to include a rather detailed, though incomplete, definition of "fixtures" in section 9-313.²⁷⁴ The proposed definition was abandoned because of complaints by real estate lawyers that it could not be understood,²⁷⁵ doubts that a clear and widely acceptable definition could be devised,²⁷⁶ and the Review Committee's conclusion that the proposal made the revision unduly complicated.²⁷⁷

The final version of revised section 9-313 does not substantially differ from the 1962 Official Text with respect to the meaning of "fixtures."²⁷⁸ Despite a rewording of subsection (1) of the 1962 Official Text, with some resulting clarification, the 1972 version involves little operative change. A three-way classification of property is still contemplated. The 1972 Official Text defines the class of pure realty as "ordinary building materials incorporated into an improvement on land." Although they may be "fixtures," they have become so much a part of the land that no Code (chattel) security interest in them can survive or be created.²⁷⁹ "Improvement on land" has been substituted for "structure . . . unless the structure remains personal property under applicable law." While "improvement" may be a somewhat broader term than "structure,"²⁸⁰ the basic concept appears to be the same—some construction on land that is, as a whole, pure real estate, as determined by the law of the state other than the Code.²⁸¹ "Ordinary building materials

²⁷³ The changes embodied in the 1972 Official Text will be referred to as the "1972 Amendments."

²⁷⁴ *First Report of the Review Committee for Article 9: Preliminary Draft No. 1*, 24 BUS. LAW 341 (1969).

²⁷⁵ 1 COOGAN, HOGAN & VAGTS § 3A.02[1], at 175; Kripke, *Mr. Levenberg's Criticism of the Final Report of the Article 9 Review Committee: A Reply*, 56 MINN. L. REV. 805, 810 (1972).

²⁷⁶ 1 COOGAN, HOGAN & VAGTS § 3A.02[1], at 174-75; Kripke, *supra* note 275, at 810. See also Kripke, *The Review Committee's Proposals to Amend the Fixture Provisions of the Uniform Commercial Code*, 25 BUS. LAW 301, 304-06 (1969).

²⁷⁷ REVIEW COMMITTEE FOR ARTICLE 9 OF THE UNIFORM COMMERCIAL CODE, PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, *PRELIMINARY DRAFT No. 2*, Comments A-1, A-2, A-3 at 4 (1970).

²⁷⁸ Compare 1962 OFFICIAL TEXT WITH COMMENTS § 9-313(1), (3), with 1972 OFFICIAL TEXT WITH COMMENTS § 9-313(1), (3).

²⁷⁹ 1972 OFFICIAL TEXT WITH COMMENTS § 9-313(2).

²⁸⁰ HENSON, *supra* note 23, § 8.1, at 187.

²⁸¹ See 1972 OFFICIAL TEXT WITH COMMENTS § 9-313, Comments 1-3. As to the problem

incorporated into” such an improvement replaces “goods incorporated into a structure in the manner of lumber, bricks, tile, cement, glass, metal work and the like,” but it is difficult to see much difference in meaning. As is true of the earlier text,²⁸² the 1972 Text leaves some uncertainty as to the category’s scope, but subsection (8) of revised section 9-313 mirrors the removability rule in section 9-303(5) of the

of determining when an “improvement” becomes so much a part of the land as to become fully real estate, Comment 2 offers some advice.

The outstanding examples presenting this kind of problem are the modern “mobile homes” and the modern prefabricated steel buildings usable as warehouses, garages, factories, etc. In the case of the mobile homes, most of them are erected on leased land and the right of the debtor under a mobile home purchase contract to remove the goods as lessee will make clear that his secured party ordinarily has a similar right. See paragraph (5)(b).

Id. § 9-313, Comment 2.

Paragraph (5) of revised section 9-313 provides that:

A security interest in fixtures, whether or not perfected has priority over the conflicting interest of an encumbrance or owner of the real estate where . . . (b) the debtor has a right to remove the goods as against the encumbrancer or owner

. . . .

This provision does not resolve the problem, however, since it assumes that a security interest exists. Under subsection (2), however, no security interest can exist in “ordinary building materials incorporated into an improvement on land,” or, presumably, in the improvement as a whole. Before 9-313(5)(6) can be applied, it first must be determined, under non-Code law, that the mobile home has not become so much a part of the realty that no security interest in it can exist. The Comment continues:

In cases where mobile homes or prefabricated steel buildings are erected by a person having an ownership interest in the land, the question into which category the buildings fall is one determined by local law. In general, the governing local law will not be that applicable in determining whether goods have become real property between landlord and tenant, or between mortgagor and mortgagee or between grantor and grantee, but rather that applicable in a three-party situation, determining whether chattel financing can survive as against parties who acquire rights through the affixation of the goods to the real estate.

Id. § 9-313, Comment 2.

This advice may be useful in a state whose non-Code law recognizes three classes of property: real, personal, and mixed. In such a state, a decision that chattel financing does not “survive” as against real estate interests may well be a holding that the goods have become fully real estate. However, in a state where only two classes of property, real and personal, have been recognized, a finding that goods have become “fixtures” and that a chattel finance interest does not survive against real estate interests does not, of itself, indicate whether, for purposes of applying the Code, the goods are to be treated as fully real estate or as goods of a mixed character to which the 9-313 priority rules can apply.

It appears that the 1972 Official Text offers little more guidance than the 1962 Text for determinations of whether constructions on land are to be treated as fully real estate or property that can be subject to both Code security interests and interests arising under real estate law. See discussion of 1962 Text accompanying and following note 22 *supra*.

²⁸² See text accompanying notes 13 & 14 *supra*.

1962 Text.²⁸³ Its presence would help justify maintenance of a narrow pure-realty class of goods.²⁸⁴

If goods are neither ordinary building materials incorporated into an improvement on land nor improvements on land, the 1972 Text is clear that they can be subject to Article 9 security interests even if they qualify as "fixtures."²⁸⁵ The 1962 Text is not so explicit but implies the same rule.²⁸⁶ The goods, however, may be purely personal property rather than fixtures. They are "fixtures" if "they become so related to particular real estate that an interest in them arises under real estate law."²⁸⁷ The 1972 Text, like its 1962 counterpart, thus leaves the problem of distinguishing pure personalty from hybrid property to non-Code law. More clearly than the 1962 Text,²⁸⁸ however, it points to the question whether the goods have become sufficiently realty so persons with interests in the real estate acquire interests in the goods as accessions to the land.

In sum, the "fixtures" concept of the 1972 Official Text is virtually the same as that of its predecessor. While the wording has been improved, some imprecision remains and the need to resort to non-Code law ensures continued difficulty in predicting results. Rather than providing a detailed definition of "fixtures," the draftsmen sought to minimize the importance of the distinction between fixtures and purely personal property by changing the priority and perfection rules.

B. *The Removability Rule*

The rule of section 9-313(5) of the 1962 Official Text, which grants the secured party a conditional privilege to remove fixtures collateral from the land in the event of the debtor's default, is preserved in the 1972 Text as subsection (8) of section 9-312. The only changes are cosmetic: removal of unnecessary cross-references to other subsections, and substitution of the simpler but equally comprehensive "all owners and encumbrancers of the land" for "the claims of all persons who have interests in the land."²⁸⁹

²⁸³ See note 15 *supra*.

²⁸⁴ *Id.*

²⁸⁵ 1972 OFFICIAL TEXT WITH COMMENTS § 9-313(2).

²⁸⁶ See text accompanying note 16 *supra*.

²⁸⁷ 1972 OFFICIAL TEXT WITH COMMENTS § 9-313(1)(a).

²⁸⁸ See text accompanying note 16 *supra*.

²⁸⁹ See generally HENSON § 8-2, at 189 n.23. The 1972 Code defines "encumbrance" as including "real estate mortgages and other liens on real estate and all other rights in real estate that are not ownership interests." 1972 OFFICIAL TEXT WITH COMMENTS § 9-105(1)(g). "Owner" is not defined but presumably includes anyone with an "ownership interest." Thus, "all owners and encumbrances" would include "all persons who have interests in the real estate."

C. *The Priority Rules*

The 1972 Official Text extensively revises the priority rules of section 9-313. The revisions set forth the general rule that a security interest in fixtures is subordinate to all conflicting real estate interests other than the debtor's²⁹⁰ and prescribe exceptions to the general rule. Collectively, the exceptions are broad in scope, but one should not lose sight of the general rule since it serves as the residuary clause of section 9-313.

1. The "First-to-File" Rule

Subsection (4)(b)²⁹¹ contains the broadest exception. It provides that a security interest in fixtures takes priority over any conflicting real estate interest if it is perfected by filing before the conflicting real estate interest is recorded. It is, however, also necessary that the security interest have priority over any conflicting interest of a predecessor in title of the present real estate claimant and that the debtor either have a recorded interest in or be in possession of the real estate.

a. *Perfection of the Security Interest*

Perfection of the security interest is a condition of priority over conflicting real estate interests under this rule. Indeed, it is a condition of priority under most of the rules of revised section 9-313. This is true whether the conflicting real estate interests arose before or after the creation of the security interest and whether the goods became fixtures before or after the real estate interests arose.

b. *"Fixture Filing"*

In discussing the 1962 Official Text, "fixture filing" has been used as a short-form reference to a filing adequate to perfect a security interest in goods which are or are to become fixtures. The 1962 Text does not use the phrase. In the 1972 Text, however, it is a term of art, defined in section 9-313(1)(b) as:

²⁹⁰ 1972 OFFICIAL TEXT WITH COMMENTS § 9-313(7) provides:

In cases not within the preceding subsections, a security interest in fixtures is subordinate to the conflicting interest of an encumbrancer or owner of the related real estate who is not the debtor.

²⁹¹ *Id.* § 9-313(4)(b) provides:

A perfected security interest in fixtures has priority over the conflicting interest of an encumbrancer or owner of the real estate where the security interest is perfected by a fixture filing before the interest of the encumbrancer or owner is of record, the security interest has priority over any conflicting interest of a predecessor in title of the encumbrancer or owner, and the debtor has an interest of record in the real estate or is in possession of the real estate.

filing in the office where a mortgage on the real estate would be filed or recorded of a financing statement covering goods which are or are to become fixtures and conforming to the requirements of subsection (5) of section 9-402.²⁹²

Section 9-402(5) in the 1972 Official Text establishes a special form for a financing statement filed as a "fixture filing."

The 1972 Text permits perfection of security interests in fixtures by methods other than "fixture filing." Although these methods suffice to give the security interest priority over conflicting interests of various types, the secured party receives the benefit of the "first-to-file" rule of 9-313(4)(b) only if his interest is perfected by a "fixture filing," which is essentially a filing that will be found in the course of a normal real estate title search.²⁹³

Perfection by fixture filing must be achieved before the conflicting real estate interest is recorded. As explained by the Comments to the 1972 Official Text, the

general principle of priority announced in this section is . . . basically that a fixture filing gives . . . the fixture security interest priority as against other real estate interests according to the usual priority rule of conveyancing, that is, the first to file on record prevails.²⁹⁴

This Comment suggests that the revision was intended to make the Code's fixture rules more palatable to real estate financiers and their lawyers. The departure from the 1962 Official Text is considerable. For example, under the earlier text, a security interest attaching to goods after they have become fixtures has no priority over preexisting real estate interests unless their holders agree to grant such priority.²⁹⁵ There is no requirement that those real estate interests be on record in order to make this rule applicable. Under revised section 9-313(4)(b), a secured party taking an interest in fixtures can gain priority over *unrecorded* preexisting real estate interests by being the first to file. This apparently applies even if he is aware of the preexisting interests before he files or even before he acquires his security interest. Further, under the 1962 Text, a security interest in fixtures generally prevails over subsequently arising real estate interests, unless those interests are acquired both without knowledge of the security interest and before it is perfected by filing.²⁹⁶ Under 9-313(4)(b) of the 1972 Text, read with subsection (7), the first to file prevails, apparently without regard to his

²⁹² *Id.* § 9-313(1)(b).

²⁹³ *See id.* § 9-313, Comment 1.

²⁹⁴ *Id.* § 9-313, Comment 4(b).

²⁹⁵ 1962 OFFICIAL TEXT WITH COMMENTS § 9-313(3).

²⁹⁶ *Id.* § 9-313(2), (4). See note 41 and accompanying text *supra*.

knowledge of the other's interest when he files or acquires his interest.²⁹⁷

In terms of the Code's internal consistency, this new priority rule may be more harmonious than the rules of the 1962 Text. In both texts, priority between conflicting Article 9 security interests is generally governed by criteria which take no account of one party's knowledge of the other interest.²⁹⁸ The parallel is, however, hardly complete. Under revised section 9-313(4)(b), the secured party, to obtain priority, must have made a fixture filing *and* his security interest must have attached to the goods²⁹⁹ before the real estate interest is recorded. Under both versions of the general rules governing priority between conflicting Article 9 security interests, however, priority can be achieved on the basis of the time of filing without regard to the order in which the respective interests are perfected.³⁰⁰ Moreover, while the conflicting real estate interests within the scope of 9-313(4)(b) of the 1972 Text include those of real estate purchasers,³⁰¹ a buyer of goods subject to an unperfected security interest often must buy without knowledge of the security interest in order to take the goods free of it under both texts.³⁰²

The "first-to-file" rule has the advantage of simplicity of application. Its justice may be defended on the ground that all it requires of either an Article 9 secured party taking an interest in goods that are or are to become fixtures, or a purchaser of an interest in the real estate involved, is that he make a real estate title search beforehand and give prompt public notice of his interest by filing or recording. These requirements, however, may impose an economically impractical burden on the secured party if the goods do not have a high value. The secured party,

²⁹⁷ See 1972 OFFICIAL TEXT WITH COMMENTS § 9-313(4)(b).

²⁹⁸ Aside from a number of special rules, the 1962 OFFICIAL TEXT WITH COMMENTS § 9-312(5) generally governs priorities. This section's rules may be summarized as: (a) unperfected security interests rank in order of attachment; (b) a perfected security interest has priority over an unperfected one; (c) perfected security interests rank in order of perfection unless both are perfected by filing; (d) if both security interests are perfected by filing, they rank in the order of filing. Section 9-312(5) in the 1972 Official Text modifies rules (b), (c), and (d) by providing that the secured party who files *or* perfects before the other has done either takes priority. Neither version refers to knowledge of a prior security interest as affecting priority in right.

²⁹⁹ 1972 OFFICIAL TEXT WITH COMMENTS § 9-303(1) (stating when a security interest is perfected) is identical with the corresponding subsection of the 1962 version. See text accompanying note 43 *supra*.

³⁰⁰ See note 298 *supra*.

³⁰¹ This is presumably included in the term "owner."

³⁰² 1962 OFFICIAL TEXT WITH COMMENTS § 9-301(1)(c) subordinates an unperfected security interest to the rights of one who is not a buyer in the ordinary course of business to the extent that the buyer gives value and receives delivery of the collateral "without knowledge of the security interest and before it is perfected." The 1972 version also applies the rule to a "buyer of farm products in ordinary course of business." 1972 OFFICIAL TEXT WITH COMMENTS § 9-301(1)(c).

however, can gain substantial protection against other potential rivals without making a "fixture filing," if he is willing to risk losing out to owners and mortgagees of the land. The draftsmen presumably considered the residual hardships imposed by the rule on Article 9 secured parties as a necessary price to pay for the real estate finance community's support of the revised fixture provisions as a whole.

A secured party cannot gain priority over an owner or encumbrancer under the first-to-file rule if a predecessor in title of the owner or encumbrancer had an interest entitled to priority over that of the secured party. The Comments to the 1972 Official Text describe this rule as merely an "apparent limitation," constituting an application of the "usual rule that a person must be entitled to transfer what he has."³⁰³ While not expressly recognized by the 1962 Official Text, it is suggested that this proposition is consistent with the third priority rule—that a security interest in fixtures generally has priority over subsequently arising real estate interests.³⁰⁴ To the extent a person acquiring an interest in real estate is a transferee of rights a predecessor in title had when his interest was transferred, the transferee's interest is not "subsequently arising."

2. Purchase Money Security Interests

Under section 9-313(4)(a) in the 1972 Official Text, a security interest in fixtures has priority over a conflicting real estate interest if

the security interest is a purchase money security interest, the interest of the encumbrancer or owner arises before the goods became fixtures, the security interest is perfected by a fixture filing before the goods became fixtures or within ten days thereafter, and the debtor has an interest of record in the real estate or is in possession of the real estate.³⁰⁵

This rule applies although the conflicting real estate interest is recorded at the time the security interest is perfected, as this rule and that of subsection (4)(b) are stated in the alternative. In modified form, this paragraph states the first priority rule of section 9-313(2) of the 1962 Official Text.³⁰⁶

The revised rule gives priority only to the holder of a "purchase

³⁰³ 1972 OFFICIAL TEXT WITH COMMENTS § 9-313, Comment 4(b).

³⁰⁴ See text accompanying note 42 *supra*.

³⁰⁵ 1972 OFFICIAL TEXT WITH COMMENTS § 9-313(4)(a). The priority conferred on a security interest by the first-to-file rule is limited to cases where "the debtor has an interest of record in the real estate or is in possession" of it. The same limitation appears in subsection (4)(a) of revised section 9-313.

³⁰⁶ See part I B 1 *supra*.

money security interest," rather than to any "security interest which attaches to goods before they become fixtures." The revision thus continues to favor the conditional seller of goods but avoids overemphasis of the form of the security agreement by referring only to "purchase money security interests,"³⁰⁷ rather than to conditional sales. Simultaneously, it withdraws the special protection of holders of preaffixation security interests that do not secure the price of the collateral³⁰⁸ conferred by the over-broad language of the earlier text. Additionally, the specific designation of "an encumbrancer or owner of the real estate [whose interest arises] before the goods became fixtures" eliminates the 1962 Text's ambiguity regarding when a real estate interest must arise in order to be considered preexisting rather than subsequent.³⁰⁹ The requirement that the purchase money security interest be "perfected by a fixture filing before the goods became fixtures or within ten days thereafter"³¹⁰ constitutes a substantial departure from section 9-313(2) of the 1962 Official Text, which does not require perfection of the security interest as a condition of priority.³¹¹ One explanation offered for this change is that it harmonizes the priority rule with the comparable rule of section 9-312(4), under which a purchase money security interest in noninventory collateral is given priority over an earlier-created and earlier-perfected security interest if the purchase money interest is perfected when the debtor receives possession of the collateral or within ten days thereafter.³¹² It has also been suggested that a filing requirement protects holders of preexisting real estate mortgages against prejudicial reliance on an appearance that the mortgage security has been increased by additions to the land.³¹³ In this context, subsection (4)(a), like subsection (4)(b), requires that perfection be achieved by "fixture filing," thus assuring that the Article 9 security interest can be discovered by a real estate title search.

Another qualification of the priority rule, not found in the 1962 Text, is that the debtor must have an interest of record in the real estate

³⁰⁷ See text accompanying notes 26 & 32 *supra*.

³⁰⁸ See text preceding and accompanying note 31 *supra*.

³⁰⁹ See text accompanying notes 24, 47, 54 & 65 *supra*.

³¹⁰ 1972 OFFICIAL TEXT WITH COMMENTS § 9-313(2).

³¹¹ See *id.* § 9-313, Comment 4(a), which refers to 1962 OFFICIAL TEXT WITH COMMENTS § 9-313 rather confusingly as "the present section 9-313." REVIEW COMMITTEE FINAL REPORT, *supra* note 7, at 202.

³¹² REVIEW COMMITTEE FINAL REPORT, *supra* note 7, at 202.

³¹³ 1 COOGAN, HOGAN & VAGTS § 3A.02[3], at 179 n.54; Funk, *supra* note 71, at 1470-71. The requirement of perfection before or within ten days after the goods become fixtures also tends to abrogate the threat of *Moore v. Bay*. See part I D 5 *supra*. Indeed, one commentator has proclaimed this as the major accomplishment of the subsection (4)(a) perfection requirement. Hawkland, *supra* note 3, at 48. See also Note, *Making the U.C.C.'s Fixture Section More Workable*, 1971 U. ILL. LAW F. 682, 696-97.

or be in possession of it.³¹⁴ This requirement is designed to prevent "possible surprise and deception of [the holder of the] real estate interests"³¹⁵ in a case where a contractor, working on land in which he has no interest of record, installs fixtures subject to security interests in favor of the fixture supplier. The primary danger of "surprise and deception" accrues to the landowner who may make payments to the contractor in the belief that he is paying for lien-free goods which the contractor has agreed to supply.³¹⁶ Under the 1962 Text, this danger is very real since the fixture supplier would qualify for priority over the landowner under 9-313(2).³¹⁷

Although the new rules of 9-313(4)(a) and (b) require fixture suppliers to file in order to qualify for priority, the filing would do the landowner no good if he had made payments to the contractor prior to the contractor's purchase of the goods since filing would not yet have been made. The same would not be true where the landowner paid the contractor after installation of fixtures. In that instance, it would be necessary for him to search the real estate records for recorded purchase money security interests prior to payment. Such a precaution is burdensome at best.³¹⁸ The Review Committee resolved that there simply could be no priority for purchase money security interests in fixtures over owners or encumbrancers whose interest in the land arose before the goods became fixtures if the debtor-contractor did not have a recorded interest in the real estate.³¹⁹

Before final approval of the proposed amendments, however, the words "or is in possession of the real estate" were added to the requirement that the debtor have an interest of record in the real estate. This change was apparently motivated by a fear that without it persons who supply goods that might become fixtures to short-term lessees would be unable to retain purchase money security interests good against the landlords and prior mortgagees of the land. The lessees would thus be unable to buy such goods on credit.³²⁰ In light of the special provision for "tenants' fixtures" in subsection (5)(b) of revised section 9-313, it seems that the change was unnecessary. The additional wording does, however, raise a question as to whether "a fixture supplier [could possibly] retain a security interest against a contractor, to the possible sur-

³¹⁴ 1972 OFFICIAL TEXT WITH COMMENTS § 9-313 (4)(a), (b).

³¹⁵ *Id.* § 9-313, Comment 5.

³¹⁶ See part I D 3 *supra*.

³¹⁷ *Id.*

³¹⁸ See Gordon, *supra* note 123, at 667-68.

³¹⁹ See REVIEW COMMITTEE FINAL REPORT, *supra* note 7, at 124 (proposed wording of subsection (4)(a)), 130 (proposed comment 5), 204, A-14 (Committee's explanation of change).

³²⁰ See 1 COOGAN, HOGAN & VAGTS § 3A.02[2], at 177 n.50.

prise and deception" of the landowner under the 1972 Text. Can it safely be assumed that no contractor will be found to be "in possession" of the land on which he is working?

As has been noted,³²¹ the qualification that the debtor must have an interest of record or be in possession of the real estate also appears in the first-to-file priority rule of subsection (4)(b). Although accounting for its presence in this subsection is somewhat difficult, it may have been considered necessary for the complete protection of the landowner and others with preexisting interests in the realty when a contractor installs fixtures subject to security interests in favor of the supplier. Even though the fixture suppliers could not claim priority under subsection (4)(a), they could occasionally do so under subsection (4)(b) on the basis of having been first to file.

A final point concerning the interaction of subsections (4)(a) and (4)(b) deserves mention. Although one with a purchase money security interest in fixtures can gain priority over preexisting real estate interests by making a fixture filing either before the goods become fixtures or within ten days thereafter, priority over *subsequently arising* real estate interests depends, under subsection (4)(b), on perfection by fixture filing "before the interest of the owner or encumbrancer is of record." There is no grace period for delayed filing.³²² Thus, to obtain maximum protection against conflicting real estate interests, a secured party, even though he has a purchase money security interest, must file as promptly as possible.

The rule of 9-313(4)(a) is the 1972 Text's major departure from the general applicability of the first-to-file principle. The comments to the revised text explain the policy reasons for retaining this modified version of the 1962 Text's first priority rule.

Real estate lending is typically long-term, and is usually done by institutional investors who can afford to take a long view of the matter rather than concentrating on the results of any particular case. It is apparent that the rule which permits and encourages purchase money fixture financing, which in contrast is typically short-term, will result in the modernization and improvement of real estate rather than in its deterioration and will on balance benefit long-term real estate lenders. Because of the short-term character of the chattel financing, it will rarely produce any conflict in fact with the real estate lender. The contrary rule would chill the availability of short-term credit for modernization of real estate by installation of new fixtures and in the long run could not help real estate lenders.³²³

³²¹ See text accompanying note 42 *supra*.

³²² See 1972 OFFICIAL TEXT WITH COMMENTS § 9-313, Comment 4(a); REVIEW COMMITTEE FINAL REPORT, *supra* note 7, at 203, A-11.

³²³ 1972 OFFICIAL TEXT WITH COMMENTS § 9-313, Comment 8. See also REVIEW COMMITTEE FINAL REPORT, *supra* note 7, at 204, A-17.

3. Construction Mortgagees: An Exception to an Exception

Under the 1972 Official Text, a purchase money secured party qualifying for priority under section 9-313(4)(a) has an Achilles' heel. It is created by 9-313(6), which provides:

Notwithstanding paragraph (a) of subsection (4) but otherwise subject to subsections (4) and (5), a security interest in fixtures is subordinate to a construction mortgage recorded before the goods become fixtures if the goods become fixtures before the completion of the construction. To the extent that it is given to refinance a construction mortgage, a mortgage has this priority to the same extent as the construction mortgage.³²⁴

A mortgage³²⁵ is a "construction mortgage to the extent that it secures an obligation incurred for the construction of an improvement on land including the acquisition cost of the land, if the recorded mortgage so indicates."³²⁶ It should be noted that a "construction mortgage" must indicate that it is such and, to have priority, must be recorded before the goods become fixtures. Presumably, this allows the potential purchase money secured parties to discover the existence of the mortgage and that it is the type of mortgage which takes precedence over purchase money security interests.

The 1962 Text gave construction mortgagees little protection against purchase money security interests in fixtures installed on the mortgaged land during the course of construction.³²⁷ The draftsmen considered the vulnerability of construction mortgagees the "weightiest objection" to section 9-313 of the 1962 Text.³²⁸ Their response, however, almost reaches the opposite extreme: As to any goods that become fixtures during the course of construction, the construction mortgagee enjoys priority to the extent of all advances made under the mortgage to finance the construction, including the cost of acquiring the land. No distinction is to be made between "optional advances" and "advances made pursuant to commitment."³²⁹ Furthermore, a comparison of the 1972 and 1962³³⁰ Texts suggests that the construction mortgagee's knowledge of the security interest at the time he makes an optional advance

³²⁴ 1972 OFFICIAL TEXT WITH COMMENTS § 9-313(6).

³²⁵ The term "mortgage," undefined in the 1962 Official Text, is defined in revised section 9-105(1)(j), as a "consensual interest created by a real estate mortgage, a trust deed on real estate, or the like." It is thus to be distinguished from "encumbrance," which includes non-consensual liens on real estate. *Id.* § 9-105(1)(g), *quoted in* note 289 *supra*.

³²⁶ *Id.* § 9-313(1)(c).

³²⁷ See text accompanying note 56 *supra*.

³²⁸ REVIEW COMMITTEE FINAL REPORT, *supra* note 7, at 205, A-17.

³²⁹ 1972 OFFICIAL TEXT WITH COMMENTS § 9-313, Comment 4(e).

³³⁰ See text accompanying note 57 *supra*.

will not preclude him from gaining priority over an intervening security interest in fixtures. Nevertheless, section 9-313(1)(c)'s definition of "construction mortgage" creates some uncertainty as to the extent of the construction mortgagee's preference. The mortgage must secure "an obligation incurred for the construction of an improvement on land" and only to the extent that it does so is it a construction mortgage.³³¹

It should be noted that subsection (6) creates an exemption only to the rule of subsection (4)(a), which permits a purchase money security interest to gain priority over preexisting real estate interests. The construction mortgage is "otherwise subject to subsections (4) and (5)." The first-to-file rule of subsection (4)(b) is relevant in this context. To have priority over an Article 9 security interest in fixtures on the mortgaged land, the construction mortgage must not only have been "recorded before the goods became fixtures," as required by subsection (6), but must also have been recorded before the security interest has been "perfected by a fixture filing" under subsection (4)(b).³³²

Peter Coogan (one of the draftsmen) has explained that the 1972 Text's preference for construction mortgagees is justified since the construction mortgagee is himself a kind of purchase money financier.³³³ The debtor should be able to use construction mortgage financing or chattel financing, whichever is cheaper. Mr. Coogan seems to imply that sellers of construction goods are fairly warned of the possibility that their buyers are engaged in improper double financing if the buyer seeks to buy on credit and grant purchase money liens as security.³³⁴

This change in the Code rules, however, has been criticized. It has been argued that construction mortgagees are in a better position to

³³¹ 1972 OFFICIAL TEXT WITH COMMENTS § 9-313(1)(c).

When is an obligation "incurred for construction"? Suppose, for example, that an advance made to the mortgagor to enable him to make a progress payment to the contractor is used for other purposes. Is his obligation to repay the advance one "incurred for construction," or is it necessary for the construction mortgagee to establish that his advance was actually used to pay costs of construction, or at least that he exercised reasonable diligence to see that it was? See Sumners, *Priority Between Deed of Trust and Subsequent Mechanic's Lien*, 30 Miss. L.J. 254 (1959), discussing similar limitations imposed on construction mortgagees in Mississippi by judicial construction of the mechanic's lien statutes. In any event, it is clear that subsection (a)'s special priority for construction mortgages is limited to advances to finance construction and is applicable only to fixtures which become such "before the completion of the construction." Hence, the subsection falls well short of a general blessing on "open-end" mortgages. Cf. 1972 OFFICIAL TEXT WITH COMMENTS § 9-313, Comment 4(e); REVIEW COMMITTEE FINAL REPORT, *supra* note 7, at 203, A-12.

³³² In the early stages of a construction project, the latter requirement could trip up a construction mortgagee. See Funk, *supra* note 71, at 1473.

³³³ 1 COOGAN, HOGAN & VAGTS § 3A.02[5], at 185.

³³⁴ See *id.* § 3A.02[5]. See also Funk, *supra* note 71, at 1472.

guard against double financing and will sometimes be unjustly enriched at the expense of fixture suppliers by gaining enhanced security on which they did not in fact rely.³³⁵

4. Readily Removable Fixtures

Subsection (4)(c) of section 9-313 in the 1972 Official Text grants priority to a security interest in fixtures over conflicting interests of owners and encumbrancers of the real estate where

the fixtures are readily removable factory or office machines or readily removable replacements of domestic appliances which are consumer goods, and before the goods become fixtures the security interest is perfected by any method permitted by this Article ³³⁶

This rather curious rule is designed to reduce the critical importance of a secured party's prediction as to whether particular goods will become fixtures.³³⁷ If the secured party concludes that the goods will not become fixtures and fails to make a fixture filing, he will nevertheless prevail over holders of conflicting real estate interests in the event that the goods are ultimately held to be fixtures, provided he has taken the appropriate steps to perfect a security interest in non-fixtures. The priority accorded is effective against *all* conflicting real estate interests.³³⁸ Subordination of all conflicting real estate interests is presumably justified because the very nature of the collateral makes it unlikely that real estate mortgagees and grantees would expect their interests to apply to such goods. For the same reason, real estate mortgagees and grantees should anticipate the likelihood of chattel security interests not filed in the real estate records.³³⁹

The types of goods referred to in this rule are such as may very well be held not to be fixtures. If so, no conflict with real estate interests arises. An attempt to insure that result was made by defining "fixtures" as not including "readily removable factory and office machines and readily removable replacements of domestic appliances"³⁴⁰ in an early draft of revised section 9-313. The final version remains neutral as to whether such goods are fixtures, but it reaches much the same result through a liberal priority rule which applies if the goods are fixtures.

³³⁵ Note, *supra* note 313, at 700. See also Gordon, *supra* note 123, at 684-85 (discussing the Review Committee's Preliminary Draft No. 1).

³³⁶ 1972 OFFICIAL TEXT WITH COMMENTS § 9-313(4)(c).

³³⁷ See *id.* § 9-313, Comment 4(d); REVIEW COMMITTEE FINAL REPORT, *supra* note 7, at 201, A-9.

³³⁸ 1972 OFFICIAL TEXT WITH COMMENTS § 9-313, Comment 4(d).

³³⁹ See generally 1 COOGAN, HOGAN & VAGTS § 3A.02[4].

³⁴⁰ *First Report of the Review Committee for Article 9: Preliminary Draft No. 1*, § 9-313(1)(b)(i) (1968), 24 BUS. LAW. 344 (1969).

At this juncture it is appropriate to consider the methods by which security interests in fixtures may be perfected under the 1972 Official Text. "Fixture filing"—filing in the real estate records—is one method; however, it is the required method only where the secured party desires priority over conflicting real estate interests under the rule of subsection (4)(d) or (4)(b) of section 9-313. Other methods of perfection include filing a financing statement in the chattel security records;³⁴¹ taking possession of the collateral;³⁴² and, in the case of consumer goods collateral, simply having a purchase money security interest in them.³⁴³ Since it is unlikely that a secured party will perfect a security interest in fixtures by possession,³⁴⁴ the only practical choices are fixture filing, chattel filing, and automatic perfection which obtains upon attachment of a purchase money security interest to consumer goods.³⁴⁵

Subsection (4)(c)'s major deficiency is its ambiguity with regard to the goods to which it applies and the somewhat arbitrary selection of its categories. What goods are "readily removable"? What is included and excluded from the category of "factory and office machines"? When

³⁴¹ 1972 OFFICIAL TEXT WITH COMMENTS § 9-302(1) lays down a general rule that "[a] financing statement must be filed to perfect all security interests," but it does not prescribe the form of the statement or the place of filing. *Id.* Section 9-401(1) requires in all three alternative forms that filing be "in the office where a mortgage on the real estate would be filed or recorded . . . when the financing statement is filed as a fixture filing (section 9-313) and the collateral is goods which are or are to become fixtures" The implication is fairly clear that even if the collateral is or is to become fixtures, filing may be effective to perfect the security interest if made in the office or offices specified by other parts of subsection (1). *See id.* § 9-401, Appendix, Reasons for 1972 Change. Similarly, section 9-402(1), (5) requires a land description in a financing statement only if "the financing statement is filed as a fixture filing (section 9-313) and the collateral is goods which are or are to become fixtures" *Id.* § 9-402(1), (5) (emphasis added).

³⁴² *Id.* § 9-305 provides: "A security interest in . . . goods . . . may be perfected by the secured party's taking possession of the collateral" *Id.* Section 9-302(1)(a) lists this as an exception to the general rule requiring filing to perfect all security interests.

³⁴³ Section 9-302(1)(d) makes an exception to the general requirement of filing to perfect security interests in the case of "a purchase money security interest in consumer goods," adding "and . . . fixture filing is required for priority over conflicting interests in fixtures to the extent provided in Section 9-313." *Id.* § 9-302(1)(d) (emphasis added). Since no other provision of Article 9 calls for any steps in addition to attachment of the security interest to perfect a purchase money security interest in consumer goods, it is automatically perfected upon attachment. *Id.* § 9-303(1); *see id.* § 9-401, Appendix, Reasons for 1972 Change.

³⁴⁴ *See* 1 COOGAN, HOGAN & VAGTS § 3A.02[4], at 181-82.

³⁴⁵ Mr. Coogan has found an ambiguity in section 9-302(1)(d) which might be read to mean that if the collateral is fixtures, a fixture filing is the only permissible method of perfection for a purchase money security interest in consumer goods. *Id.* § 3A.02[4], at 181 n.58. He points out, however, that Comment 4(d) to section 9-313 of the 1972 Official Text indicates that the draftsmen intended that perfection without any filing should be possible in such cases. *Id.*; *see* 1972 OFFICIAL TEXT WITH COMMENTS § 9-313, Comment 4(d).

will goods be treated as "replacements of domestic appliances"? Why include "factory and office machines" but not "farm machinery"? Why limit "domestic appliances" to those "which are consumer goods"?³⁴⁶

The "domestic appliances" category is a very limited one. Even if "domestic appliances" are "consumer goods," the secured party cannot have priority under this subsection if the goods are original equipment, rather than "replacements." The Comments to the 1972 Text account for this restriction on the ground that real estate financing of new dwellings often includes financing of the original appliances. The construction mortgage priority is, therefore, thought appropriately applicable to them.³⁴⁷ Moreover, the limitation of the category to replacements of "consumer goods" requires that the goods replaced must have been used by the debtor for "personal, family or household purposes."³⁴⁸ For example, if a landlord living in one apartment of a four-apartment building replaced the air-conditioning units in all four apartments with new units acquired under a conditional sales contract, and if the air-conditioners are classified as fixtures and as "domestic appliances," the suppliers would have priority, without fixture filing, over the holder of a real estate mortgage on the building *only* as to the replacement unit installed in the landlord's apartment.³⁴⁹ The "factory or office machines" category, however, may include original equipment. The comments account for the rule's broader scope by explaining that "[f]actory and office machines are not always financed as part of a construction mortgage,

³⁴⁶ See 1 COOGAN, HOGAN & VAGTS § 3A.02[4], at 182-84.

³⁴⁷ 1972 OFFICIAL TEXT WITH COMMENTS § 9-313, Comment 4(d).

³⁴⁸ *Id.* § 9-109(1).

³⁴⁹ See 1 COOGAN, HOGAN & VAGTS § 3A.02[4], at 184. The Comments rationalize this distinction by stating that

it is recognized that (when not supplied by tenants) appliances in commercial apartment buildings are intended as permanent improvements, and no special rule is stated for appliances in that case. The special priority rule here stated in favor of chattel financing is limited to situations where the installation of appliances may not be intended to be *permanent*, i.e., replacement appliances used by the debtor or his family (consumer goods). The principal effect of the rule is to make clear that a secured party financing occasional replacements of domestic appliances in noncommercial owner-occupied contexts need not concern himself with real estate descriptions or records; indeed, for a purchase money replacement of consumer goods, perfection without any filing will be possible

1972 OFFICIAL TEXT WITH COMMENTS § 9-313, Comment 4(d). It should be noted that although perfection without filing is possible where the security interest is a purchase-money interest in consumer goods, the secured party would often be wise to make at least a chattel filing. If he does not, under section 9-307(2), he runs the risk of losing his collateral to one who buys the goods from the debtor for his own personal, family or household use and without knowledge of the security interest.

and the mortgagee should be alert to conflicting chattel financing of these machines.”³⁵⁰

5. Lien Creditors

Subsection (4)(d) of section 9-313 in the 1972 Official Text is likely to be of considerable value to secured parties. The rules of subsection (4)(a) and (4)(b) require “fixture filing” for an Article 9 security interest to have priority over “the conflicting interest of an owner or encumbrancer.” “Encumbrance” is broadly defined in section 9-105(1)(g) to include not only real estate interests created with the owner’s consent, such as mortgages and deeds of trust, but also interests acquired by operation of law, such as judgment liens. Hence, if the Code made no special provision to the contrary, most secured parties would have to make fixture filings for protection against the debtor’s trustee in bankruptcy. Section 9-313(4)(d), however, provides that

[a] perfected security interest in fixtures has priority over the conflicting interest of an encumbrancer or owner where . . . the conflicting interest is a lien on the real estate obtained by legal or equitable proceedings after the security interest was perfected by any method permitted by this Article.³⁵¹

This provision is designed to diminish the importance of the secured party’s guess as to whether collateral will ultimately be held to be fixtures.³⁵² Consequently, it takes much of the sting out of the “secured party’s dilemma” under the 1962 Official Text.³⁵³ The rule also allows a secured party who knows that goods are, or will become, fixtures to gain a substantial measure of protection by making a less burdensome and less expensive filing. In fact, a secured party with a purchase money security interest in consumer goods need not file at all if he is willing to risk losing his collateral to mortgagees and owners of the real estate.³⁵⁴ Since lien creditors do not ordinarily search real estate records before taking steps to acquire their liens, there is little danger of their being injured by reason of reliance on the records.³⁵⁵

One of the draftsmen’s major goals in devising subsection (4)(d) was to immunize security interests against attacks by the debtor’s trus-

³⁵⁰ 1972 OFFICIAL TEXT WITH COMMENTS § 9-313, Comment 4(d). Since goods in this category will be classified as “equipment,” rather than “consumer goods,” *see id.* § 9-109(1), (2), some type of filing will be necessary for perfection. If section 9-313(4)(c) is applicable, however, “fixture filing” will not be necessary.

³⁵¹ *Id.* § 9-313(4)(d).

³⁵² *See* REVIEW COMMITTEE FINAL REPORT, *supra* note 7, at 200, A-8.

³⁵³ *See* part I C 3 *supra*.

³⁵⁴ *See* Funk, *supra* note 71, at 1474.

³⁵⁵ *See* 1972 OFFICIAL TEXT WITH COMMENTS § 9-313, Comment 4(c).

tee in bankruptcy.³⁵⁶ Under the 1962 Official Text, if the secured party fails to realize that goods are or are to become fixtures and consequently fails to file a financing statement in accordance with the fixture filing rules, his security interest will be unperfected for all purposes.³⁵⁷ Consequently, the debtor's trustee in bankruptcy will almost certainly be able to defeat it in his capacity as a hypothetical lien creditor.³⁵⁸ Under the 1972 revision, fixture filing is only one of several methods of perfecting a security interest in fixtures. By virtue of 9-313(4)(d), if the secured party promptly perfects in any way before his debtor's bankruptcy, he should be immune from the trustee's attack.

Oddly enough, the draftsmen did not provide for the reverse situation: where the secured party makes a fixture filing on the mistaken assumption that the collateral is, or will become, fixtures. Under the 1972 Text, a security interest in goods which are purely personal property cannot be perfected by a "fixtures filing." Section 9-401(1), in all three alternative versions, requires a filing in the office where a mortgage on the real estate would be filed or recorded "when the financing statement is filed as a fixture filing (section 9-313) *and the collateral is goods which are or are to become fixtures.*"³⁵⁹ To perfect a security interest in goods which do not qualify as fixtures, any filing would have to be in the office or offices specified in other paragraphs of section 9-401(1). The secured party remains vulnerable to the trustee's claim as a hypothetical lien creditor even though he complies with section 9-401(1).³⁶⁰

It should also be noted that even when the rule of 9-313(4)(d) applies the secured party is not guaranteed immunity from attack by the debtor's trustee in bankruptcy.³⁶¹ The Code draftsmen have not attempted to foreclose all avenues of attack by the trustee. Indeed, they could not do so since the UCC, as state law, cannot override valid provisions of a federal act. The most that could be done was to modify state law in areas where the Bankruptcy Act permits reference to state law for applicable rules.

³⁵⁶ *Id.*; REVIEW COMMITTEE FINAL REPORT, *supra* note 7, at 200, A-8.

³⁵⁷ See part I C 3 *supra*.

³⁵⁸ See text accompanying notes 55 & 56 *supra*.

³⁵⁹ 1972 OFFICIAL TEXT WITH COMMENTS § 9-401(1) (emphasis added).

³⁶⁰ See Hawkland, *supra* note 3, at 50. The Bankruptcy Act gives the trustee many powers in addition to his status as a hypothetical lien creditor.

³⁶¹ In particular, the "voidable preference" provision of section 60 of the Bankruptcy Act, 11 U.S.C. § 96(a), (b) (1970), may operate to defeat the security interest. See 1 COOGAN, HOGAN & VAGTS § 3A.02[6], at 188-91; Hawkland, *supra* note 3, at 49-50.

6. Tenants' "Fixtures"

The status of security interests in goods affixed by tenants, uncertain under the 1962 Official Text,³⁶² is clarified by the 1972 Text. Section 9-313(5)(b) provides:

A security interest in fixtures, whether or not perfected, has priority over the conflicting interest of an encumbrancer or owner of the real estate where . . . the . . . debtor has a right to remove the goods as against the encumbrancer or owner. If the debtor's right terminates, the priority of the security interest continues for a reasonable time.³⁶³

While this rule could apply, for example, to goods affixed to land by a licensee or the owner of an easement,³⁶⁴ its principal significance will probably be in case of tenants' affixations, where the non-Code law of fixtures has been particularly confusing.³⁶⁵ Here, the 1972 Official Text again seeks to minimize the importance of a secured party's guess as to whether the courts will call the goods "fixtures." If the goods are not "fixtures," no rule of priority *vis-à-vis* real estate interests is needed. If they are, the secured party will prevail by reason of the priority rule of subsection (4)(b), regardless of whether his security interest is perfected, if the tenant-debtor has a right of removal against the party claiming the goods as real estate. Although non-Code law governs whether such a right of removal exists, most jurisdictions have been quite generous with tenants.³⁶⁶

7. Subordination Agreements

A final exception to the general rule of priority for real estate interests established by section 9-313(7) of the 1972 Official Text is found in subsection (5)(a).³⁶⁷ It embodies the unsurprising proposition that holders of conflicting real estate interests can waive their priority rights: A security interest in fixtures, perfected or unperfected, has priority over the interest of any encumbrancer or owner who "has consented in writing to the security interest or has disclaimed an interest in the goods as fixtures."³⁶⁸

³⁶² See text accompanying and following note 113 *supra*.

³⁶³ 1972 OFFICIAL TEXT WITH COMMENTS § 9-313(5)(b).

³⁶⁴ See *id.* § 9-313, Comment 6; REVIEW COMMITTEE FINAL REPORT, *supra* note 7, at 204, A-15.

³⁶⁵ See note 113 and accompanying text *supra*.

³⁶⁶ See notes 113 through 117 and accompanying text *supra*.

³⁶⁷ 1972 OFFICIAL TEXT WITH COMMENTS § 9-313(5)(a).

³⁶⁸ *Id.*

D. The Perfection Rules

As previously noted, the 1972 Text significantly alters the rules dealing with perfection of security interests in fixtures. It allows the secured party to choose from various methods. He may perfect by making "a fixture filing" or by any other method authorized by Article 9 for the perfection of security interests in nonfixture collateral. This flexibility is in sharp contrast to the perfection rules of the 1962 Text, where the methods of perfection for fixtures and nonfixture collateral are mutually exclusive.³⁶⁹

All of the methods of perfection authorized by the 1972 Text are, however, not equally effective in immunizing the secured party against conflicting claims. Fixture filing is the only method by which the secured party can attain priority over subsequently recorded real estate interests under the first-to-file rule of 9-313(4)(b).³⁷⁰ Moreover, under 9-313(4)(a), it is the *only* means by which the holder of a purchase money security interest in fixtures can gain priority over previously recorded real estate interests.³⁷¹ Perfection by *any* method, however, gives the secured party the benefit of priority rules appearing in sections other than section 9-313.³⁷² Furthermore, under 9-301(1)(b) and 9-313(4)(d), perfection without fixture filing provides protection against both subsequent lien creditors and the debtor's trustee in bankruptcy.³⁷³ Finally, perfection without fixture filing can immunize the security interest against the claims of real estate owners and encumbrancers where the collateral is readily removable equipment or consumer goods of the type described in 9-313(4)(c).³⁷⁴

These more flexible perfection rules generate two liberalizing effects: (1) They reduce the importance of the secured party's prediction as to whether the goods will be held "fixtures"; and (2) allow a secured party who correctly predicts that the goods will be held to be fixtures to employ means of perfection less burdensome than fixture filing if he is willing to risk losing his collateral to real estate interests.

The major peril facing the secured party is that if he *incorrectly* predicts that the collateral *will* be held to be fixtures and makes only a fixture filing, his interest will be totally unperfected.³⁷⁵ Thus, under the

³⁶⁹ See text accompanying notes 88 through 90 *supra*.

³⁷⁰ See part III C 1 *supra*.

³⁷¹ See text accompanying notes 305 through 313 *supra*.

³⁷² Such provisions include sections 9-312(4) and (5), dealing with priorities between Article 9 security interests, and section 9-301(1)(e), dealing with priorities between a security interest and the interest of a buyer of the goods.

³⁷³ See text accompanying notes 351 through 361 *supra*.

³⁷⁴ See part III C 4 *supra*.

³⁷⁵ 1972 OFFICIAL TEXT WITH COMMENTS § 9-401(1). See text accompanying note 359 *supra*.

1972 Text there will still be a few cases where the secured party's only safe course will be to make a fixture filing and a filing appropriate for nonfixture collateral.³⁷⁶

Other than to authorize their use in regard to fixture collateral, the 1972 Official Text makes no change in the rules applicable to methods of perfection other than fixture filing. The new rules governing fixture filing in the 1972 Text do, however, require consideration. "Fixture filing" is defined by 9-313(1)(b)³⁷⁷ and its elements are specifically detailed. That definition, however, is somewhat modified by sections 9-401 and 9-402.

1. Where to File—The General Rule

Section 9-401(1), in all three alternative forms offered by the Official Text, provides that

when the financing statement is filed as a fixture filing (section 9-313) and the collateral is goods which are or are to become fixtures, then [the proper place to file is] in the office where a mortgage on the real estate would be filed or recorded.³⁷⁸

While the wording is similar to that of the 1962 Text, there are three differences. First, it is made clear that filing must be made in the office where a mortgage on the land would be filed or recorded only if the secured party wants to make a "fixture filing," *i.e.*, the special type of filing required to obtain priority over conflicting real estate interests under paragraphs (a) and (b) of section 9-313(4).³⁷⁹ Second, while the 1962 Text refers to "the real estate concerned," the 1972 Text omits the word "concerned." This omission, however, is probably without substantive significance. Third, though the rule of the 1962 Text applies when the "collateral is goods which at the time the security interest attaches are or are to become fixtures,"³⁸⁰ the 1972 version omits the words "at the time the security interest attaches." This change is of such potential significance that it will be treated at length below.³⁸¹

2. Where to File—Transmitting Utilities' Fixtures

A new subsection, 9-401(5), constitutes an exception to the general rule of 9-401(1). That subsection provides:

³⁷⁶ See Funk, *supra* note 71, at 1471.

³⁷⁷ See part III C 1 *b supra*.

³⁷⁸ 1972 OFFICIAL TEXT WITH COMMENTS § 9-401(1).

³⁷⁹ See text accompanying note 85 *supra*.

³⁸⁰ *Id.*

³⁸¹ See text accompanying notes 403 & 404 *infra*.

Notwithstanding the preceding subsections, and subject to subsection (3) of Section 9-302, the proper place to file in order to perfect a security interest in collateral, including fixtures, of a transmitting utility is the office of the [Secretary of State]. This filing constitutes a fixture filing (Section 9-313) as to the collateral described therein which is or is to become fixtures.³⁸²

This special rule remedies a deficiency of the 1962 Official Text which led to many nonuniform departures from that text.³⁸³

3. What to File—The General Rules

Subsection 9-402(1) of the 1972 Text requires that a financing statement give the names and addresses of the debtor and the secured party, indicate the types or describe the items of collateral, and be signed by the debtor.³⁸⁴ Additionally, "when the financing statement is filed as a fixture filing (section 9-313) and the collateral is goods which are or are to become fixtures, the statement must . . . comply with subsection (5)" of section 9-402.³⁸⁵

The cumulative effect of this subsection is that the financing statement is now required to show not only that it covers fixtures but also that it is intended to be filed or recorded in the real estate records. Filing officers, therefore, will have no doubt as to how the statement should be handled. The statement must describe the realty, and optional language is offered by which enacting legislatures may require a description of the same type that would be required for a real estate mortgage. Moreover, since the revised Code allows the possibility for a secured party to gain priority over real estate interests by fixture filing when the

³⁸² 1972 OFFICIAL TEXT WITH COMMENTS § 9-401(5). The term "transmitting utility" is defined in a new paragraph (n) of section 9-105(1) as

any person primarily engaged in the railroad, street railway or trolley bus business, the electric or electronics communications transmission business, the transmission of goods by pipeline, or the transmission or production and transmission of electricity, steam, gas or water, or the provision of sewer service.

³⁸³ *Id.* § 9-401, Comment 7; REVIEW COMMITTEE FINAL REPORT, *supra* note 7, at 243, I-1. See note 198 and accompanying text *supra*.

³⁸⁴ 1972 OFFICIAL TEXT WITH COMMENTS § 9-402(1). These requirements differ from those of the 1962 Text only in that the earlier text did not explicitly require the names of the debtor and secured party. It did, however, require the signatures of both. In contrast, the 1972 Text requires that both be named but that only the debtor sign. The change was made to avoid unpleasant surprise to persons accustomed to non-Code mortgaging practice under which only the debtor signs the mortgage. If the mortgage is employed as a financing statement, it could fail to qualify under the 1962 Official Text for lack of the mortgagee's signature. *Id.* § 9-402, Appendix, Reasons for 1972 Change; see text accompanying note 108 *supra*.

³⁸⁵ 1972 OFFICIAL TEXT WITH COMMENTS § 9-402(1). See also the definition of "fixture filing" contained in section 9-313(1)(b).

debtor has no recorded interest in the land, the financing statement is, in that situation, required to show the name of a record owner.

The instructions to filing officers appearing in section 9-403 of the 1972 Text are closely related to these provisions. Subsection (4), continuing the standard instructions of the 1962 Text, requires the filing officer to mark each financing statement with a file number³⁸⁶ and the date and hour of filing; to hold the statement³⁸⁷ for public inspection; to index the statement under the debtor's name; and to note the file number and the debtor's address in the index. These instructions, however, do not apply when subsection 9-403(7) applies. That new subsection provides:

When a financing statement . . . is filed as a fixture filing, [it shall be filed for record and] the filing officer shall index it under the names of the debtor and any owner of record shown on the financing statement in the same fashion as if they were the mortgagors in a mortgage of the real estate described, and, to the extent that the law of this state provides for indexing of mortgages under the name of the mortgagee, under the name of the secured party as if he were the mortgagee thereunder, or where indexing is by description in the same fashion as if the financing statement were a mortgage of the real estate described.³⁸⁸

This subsection completes the coordination of fixture filings with the real estate records system.

4. What to File—Transmitting Utilities

Fixture filing as to property of transmitting utilities is exempt from the 1972 Text's general place-of-filing rules.³⁸⁹ The same is true as to the form of a financing statement covering the property of such a utility, even if the collateral is fixtures. The additional requirements of 9-402(5) for financing statements intended as fixture filings apply only "where the debtor is not a transmitting utility."³⁹⁰ Since no other part of the Code establishes special requirements of form for utilities' fixtures fil-

³⁸⁶ The 1962 Official Text requires that the statement be marked with a "consecutive file number." 1962 OFFICIAL TEXT WITH COMMENTS § 9-403(4). The word "consecutive" is deleted from the 1972 Text.

³⁸⁷ The 1972 Official Text authorizes the holding of "a microfilm or other photographic copy" of the financing statement for public inspection. 1972 OFFICIAL TEXT WITH COMMENTS § 9-403(4).

³⁸⁸ *Id.* § 9-403(7). A draftsman's note to section 9-403 indicates that the bracketed words should be used in any state where writings will not appear in the real estate records and their indices unless they are actually recorded.

³⁸⁹ See text accompanying notes 380 through 382 *supra*.

³⁹⁰ 1972 OFFICIAL TEXT WITH COMMENTS § 9-402(5).

ings, the applicable rules are those generally applicable to financing statements in 9-402(1).³⁹¹ The major difference is that fixture filing as to fixtures of a transmitting utility can be achieved without including any description of the lands concerned in the financing statement.

5. What to File—Combined Mortgages

Subsection 9-402(6) in the 1972 Text somewhat simplifies the problem of combining a real estate mortgage with an Article 9 security agreement and financing statement covering fixtures.³⁹² This new subsection provides:

A mortgage is effective as a financing statement filed as a fixture filing from the date of its recording if (a) the goods are described in the mortgage by item or type; and (b) the goods are or are to become fixtures related to the real estate described in the mortgage; and (c) the mortgage complies with the requirements for a financing statement in this section other than a recital that it is to be filed in the real estate records; and (d) the mortgage is duly recorded. No fee with reference to the financing statement is required other than the regular recording and satisfaction fees with respect to the mortgage.³⁹³

The effect of this subsection is not revolutionary. Combined mortgages should qualify as Article 9 security agreements and financing statements covering fixtures under the 1962 Text. There are, however, numerous pitfalls to be avoided in drafting and filing.³⁹⁴

Subsection 9-402(6) simplifies the problem by making it clear that filing and recording the mortgage as a real estate mortgage will suffice for fixture filing perfection of the Article 9 security interest in any fixtures covered. It also eliminates the need to pay a double fee. This subsection also dispenses with the superfluous requirement that the financing statement recite that it is to be filed in the real estate records. Moreover, the change in the basic requirement of Article 9 financing statements set out in 9-402(1), eliminating the need for the secured party's signature, makes the unusual procedure of having the mortgagee sign the mortgage unnecessary.³⁹⁵

It should be noted that the single-filing rule of section 9-402(6) does *not* apply to security interests in purely personal property covered by the mortgage. At least one separate filing, probably in a different office,

³⁹¹ See text accompanying note 384 *supra*.

³⁹² See part I D 1 *supra*, discussing the problem under the 1962 Official Text.

³⁹³ 1972 OFFICIAL TEXT WITH COMMENTS § 9-402(6).

³⁹⁴ See part I D 1 *supra*.

³⁹⁵ See note 384 *supra*.

will be necessary to perfect the security interest in pure chattels covered by a combination mortgage.³⁹⁶

The wording of 9-402(6) could, however, induce error. For a combined mortgage to be effective as a fixture filing, the subsection requires that the fixture be "described in the mortgage by item or type." If the description is merely "by type," however, the filing might not perfect the security interest. This conclusion follows since: (1) perfection is achieved, according to 9-303(1) *only* when the security interest "*has attached and when all applicable steps required for perfection have been taken*";³⁹⁷ (2) under 9-203(1)(a), a security interest cannot "attach" if the secured party does not have possession of the collateral, unless "the debtor has signed a security agreement which contains a description of the collateral;"³⁹⁸ and (3) under 9-110, the description of the collateral in the signed writing must be adequate to "identify[y] what is described." Thus, the combined mortgage qualifies as a fixture filing *financing statement* if it merely describes the *types* of fixtures subject to the security interest; but if it is also to serve as a *security agreement*, the mortgage must describe the fixtures with sufficient precision to identify the *particular fixtures* subject to the security interest.

6. Duration of Effectiveness of Filing

Under section 9-403(2) in the 1962 Text, a

filed financial statement which states a maturity date of the obligation secured of five years or less is effective until such maturity date and thereafter for a period of 60 days. Any other filed financing statement is effective for a period of five years from the date of filing.³⁹⁹

The effectiveness of a financing statement can be extended for 5 years by filing a "continuation statement" before the effective period of the original filing terminates. Thereafter, successive 5-year extensions can be achieved by filing additional continuation statements.⁴⁰⁰

³⁹⁶ See 1972 OFFICIAL TEXT WITH COMMENTS § 9-402, Comment 6.

³⁹⁷ *Id.* § 9-303(1) (emphasis added).

³⁹⁸ This is a change from the 1962 Official Text, under which it is possible for a security interest to attach to collateral though no writing has been signed and the secured party is out of possession. 1962 OFFICIAL TEXT WITH COMMENTS § 9-204(1). However, if the secured party does not have possession of the collateral and the debtor has signed no writing describing the collateral, the "security interest is not enforceable against the debtor or third parties." *Id.* § 9-203(1). The 1972 Official Text combines the requirements of 9-203(1) and 9-204(1) of the earlier text to eliminate the anomaly of an "attached," and possibly "perfected," security interest being "unenforceable" against anyone. 1972 OFFICIAL TEXT WITH COMMENTS § 9-203(1).

³⁹⁹ 1962 OFFICIAL TEXT WITH COMMENTS § 9-403(2).

⁴⁰⁰ *Id.* § 9-403(3).

The 1972 Text provides for a 5-year period of effectiveness from the original filing even though the financing statement shows a maturity date for the obligation secured.⁴⁰¹ Further, like the 1962 Text, it provides for additional 5-year extensions by the filing of successive continuation statements.⁴⁰² These rules, however, do not apply to all financing statements:

If the debtor is a transmitting utility (subsection (5) of Section 9-401) and a filed financing statement so states, it is effective until a termination statement is filed. A real estate mortgage which is effective as a fixture filing under subsection (6) of section 9-402 remains effective as a fixture filing until the mortgage is released or satisfied of record or its effectiveness otherwise terminates as to real estate.⁴⁰³

E. Some Loose Ends

1. Goods Becoming Fixtures After Nonfixture Filing

Where the collateral is goods which neither were nor were expected to become fixtures at the time the security interest attached, but which later became fixtures, the application of 9-314(a),(b) is unclear. The original filing would necessarily be appropriate for nonfixture collateral. It probably would not be filed in the office where a real estate mortgage on the land would be filed or recorded and certainly would not contain a description of the land.

Once the goods are so affixed to land as to become fixtures, the possibility of conflict with real estate interests arises, and the priority rule of 9-313(4)(a) or 9-313(4)(b) may have to be applied. Each of these priority rules gives the secured party priority *only* if he has perfected his

⁴⁰¹ 1972 OFFICIAL TEXT WITH COMMENTS § 9-403(2).

⁴⁰² *Id.* § 9-403(3).

⁴⁰³ *Id.* § 9-403(6). One other change in the perfection rules of the 1972 Official Text with specific application to fixtures is found in section 9-405(2). That section deals with assignments of security interests and provisions for the filing of assignment notices. In the 1962 Text, the filing officer is directed to mark each such notice with the date and hour of filing and to note the assignment on the index of the financing statement. The 1972 Text adds:

or in the case of a fixture filing . . . he shall index the assignment under the name of the assignor as grantor and, to the extent that the law of this state provides for indexing the assignment of a mortgage under the name of the assignee, he shall index the assignment of the financing statement under the name of the assignee Notwithstanding the provisions of this subsection, an assignment of record of a security interest in a fixture contained in a mortgage effective as a fixture filing (subsection (6) of Section 9-402) may be made only by an assignment of the mortgage in the manner provided by the law of this state other than this Act.

Id. § 9-405(2).

security interest "by a fixture filing." This filing must take place before the conflicting security interest is of record under subsection (4)(b), and before or within 10 days after the goods became fixtures under subsection (4)(a). It seems to follow that the secured party must, at the very least, make a "fixture filing" in order to attain priority under either rule. It may, however, be impossible to qualify for priority by a new filing if the deadline specified by subsection (4)(b) passes before the goods become fixtures or the security interest is not a purchase money interest. Even under subsection (4)(a), the secured party must monitor the debtor's use of the collateral after he has made his original filing to be able to make a fixture filing within 10 days after the goods become fixtures.

The deletion of the words "at the time the security interest attaches" from the place of filing rule as to fixtures⁴⁰⁴ supports this reading of section 9-313.⁴⁰⁵ The rule, as it reads in the revised text, is that "when the financing statement is filed in a fixture filing (section 9-313) and the collateral is goods which are or are to become fixtures," filing must be "in the office where a mortgage on the real estate would be filed or recorded."⁴⁰⁶ If the 1972 Text contemplates the necessity of a new filing to gain priority over conflicting real estate interests whenever the goods become fixtures, the revised wording is more appropriate than the 1962 Text. Also, the "are or are to become fixtures" wording can refer to the time of either the original filing or a subsequent one.

It is true that the 1972 Text retains the rule of subsection 9-401(3) without change:

A filing which is made in the proper place in this state continues effective even though the debtor's residence or place of business or *the location of the collateral or its use*, whichever controlled the original filing, is thereafter changed.⁴⁰⁷

This subsection can easily be reconciled with the suggested reading of subsections 9-313(4)(a) and 9-313(4)(b). The original filing was, and continues to be, "effective" to perfect the security interest, but it was not a "fixture filing" and nothing in 9-401(3) suggests that it became one when the goods became fixtures.

From a policy standpoint, the change could be justified because persons having or acquiring interests in the real estate would be able to rely on the real estate records with greater confidence than if the original nonfixture filing were sufficient to give the secured party priority over

⁴⁰⁴ *Id.* § 9-401(1).

⁴⁰⁵ See text accompanying note 381 *supra*.

⁴⁰⁶ 1972 OFFICIAL TEXT WITH COMMENTS § 9-401(1) (Alternative 1).

⁴⁰⁷ *Id.* § 9-401(3) (emphasis added).

conflicting real estate interests. The revisions may have further shifted the priority rules in favor of real estate interests to gain wider support for the Code's fixtures provisions as a whole.

The apparent absence of comment by the draftsmen that such a change was intended raises doubt as to the correctness of this reading of the revised text. Since very few states have modified the 1962 Text to require a fixture filing when collateral unexpectedly becomes fixtures after an original nonfixture filing which was entirely appropriate at the time it was made,⁴⁰⁸ one would expect that submission to a minority view on so substantial a change in the priority rules would be publicly acknowledged.

2. Mortgages Securing Future Advances

Excepting construction mortgages, the 1972 Text does not specifically deal with the status of a real estate mortgagee who makes an advance secured by a preexisting mortgage after an Article 9 security interest in fixtures has arisen. In contrast, section 9-313(4)(c) of the 1962 Text provides a special, albeit ambiguous, rule to cover such cases.⁴⁰⁹ In this context, the operation of the rules of the 1972 Text is not clear.

To illustrate the ambiguity, consider a case involving the most favored of Code security interests, the purchase money security interest. Suppose *A* is the record owner of a farm, Blackacre. *B* loans \$50,000 to *A*, taking a mortgage on Blackacre as security. The mortgage provides that it is to secure not only the \$50,000 loan but also any further loans that *B* may make to *A*. Subsequently *A* buys an electric generator from *C* under a conditional sale contract, and *C*, before delivering the generator, makes a fixture filing describing the generator as the collateral and Blackacre as the land concerned. After installation of the generator on *A*'s farm, *B* makes an additional loan of \$25,000. Assume further that the future advance clause of the mortgage is valid, the mortgage was properly recorded before *C* sold the generator to *A*, neither loan to *A* was made to finance construction, and that the generator became a fixture upon installation. On these "facts," what is the priority as between *B* and *C* if both claim the generator?

Insofar as the mortgage secures *A*'s indebtedness for *B*'s original \$50,000 loan, *C* would clearly have priority over *B* under subsection 9-313(4)(a). *C*'s interest is a purchase money interest and *B*'s interest arose before the goods became fixtures. The security interest was perfected by fixture filing before the goods became fixtures. The debtor has at all times had an interest in the real estate and the exception in favor

⁴⁰⁸ See text accompanying note 180 *supra*.

⁴⁰⁹ See part I B 4 *c supra*.

of construction mortgages in subsection 9-313(6) does not apply.

The status of *B*'s security for the \$25,000 loan is not so clear. Apparently, the central question is whether *B* should be considered as having but one mortgage interest in Blackacre, which arose at the time the mortgage was given, or as having acquired a second "interest" in Blackacre at the time of his \$25,000 loan. If *B* has a single "interest" which simply increases in value by virtue of his second loan, the priority rule of 9-313(4)(a) should give *C* complete priority over *B*. However, if the \$25,000 loan created a new "interest" in Blackacre, as if *B* had taken a new mortgage to secure the loan, the priority rule of 9-313(4)(a) will not help *C*. That rule applies only if "the interest of the encumbrancer or owner arises before the goods become fixtures."⁴¹⁰ The applicable rule would appear to be that of 9-313(7): "In cases not within preceeding subsections, a security interest in fixtures is subordinate to the conflicting interest of an encumbrancer or owner of the related real estate who is not the debtor."⁴¹¹

While *C* may invoke the first-to-file rule of 9-313(4)(b), it is doubtful that this rule would give him priority over *B* in these circumstances. The first-to-file rule grants priority to the Article 9 secured party only when "the security interest is perfected by a fixture filing before the interest of the owner or encumbrancer is of record."⁴¹² Even if *B* acquired a new interest in Blackacre upon making the \$25,000 loan, was not the "record" of it made when the mortgage was recorded? If *B*'s interest was not "of record" at that time, it seems that it never would be. Yet this was the only "record" *B* had to make to give constructive notice of his interest.

If *B* did prevail over *C* to the extent of the \$25,000, the result would be contrary to both the pre-Code majority rule⁴¹³ and the probable result under the 1962 Official Text.⁴¹⁴ Is such a change in the law intended? The difficulty is that pre-Code case law conflicted as to whether a mortgagee making an advance under a previously executed open-end mortgage thereby acquired a new mortgage interest,⁴¹⁵ and the Code itself does not indicate which pre-Code theory is to govern.

Insofar as the Official Comments offer any clue to the correct

⁴¹⁰ 1972 OFFICIAL TEXT WITH COMMENTS § 9-313(4)(a).

⁴¹¹ *Id.* § 9-313(7).

⁴¹² *Id.* § 9-313(4)(b).

⁴¹³ See OSBORNE, *supra* note 59, §§ 118, 213.

⁴¹⁴ See 1962 OFFICIAL TEXT WITH COMMENTS § 9-313(4)(c); part I B 4 *c supra*.

⁴¹⁵ OSBORNE, *supra* note 59, §§ 114, 117. Professor Osborne forcefully argues that the only "interest" in the land the mortgagee has is one created when the mortgage was given. He acknowledges, however, substantial case support for the "new mortgage" theory. It may be that the draftsmen of the 1972 version of the Code either assumed the one-interest theory would prevail or deliberately chose to leave the matter to local law.

reading, they seem to indicate that *C* would prevail. In discussing the 10-day grace period allowed the purchase money secured party by 9-313(4)(a) for fixture filing after goods have become fixtures, the draftsmen stated:

It should be emphasized that this purchase money priority with the 10-day grace period for filing is limited to rights against prior real estate interests. There is no such priority with the 10-day grace period as against subsequent real estate interests. The fixture security interest can defeat subsequent real estate interests only if it is filed first and prevails under the usual conveyancing rule recognized in paragraph (4)(b).⁴¹⁶

This language suggests that if the holder of a purchase money security interest makes a fixture filing before the goods become fixtures, he will prevail over conflicting claims of all present and future owners and encumbrancers other than holders of prerecorded construction mortgages. Mr. Coogan has quite positively expressed this view.⁴¹⁷ Unfortunately, neither the comments nor Mr. Coogan mention open-end mortgages in this context. The soundest way to ensure *C*'s complete priority over *B* is to treat the open-end mortgagee as having a single "interest" in the real estate which secures all of his advances.⁴¹⁸

3. The Problem of "Waste"

The 1972 revision does little to afford a real estate mortgagee greater protection against diminution in value of his security by reason of his debtor's wrongful removal of fixtures which are free of security interests entitled to priority and his substitution of new fixtures subject to security interests having priority over the mortgage.⁴¹⁹ Limiting subsection 9-313(4)(a)'s priority rule to purchase money security interests protects the mortgagee against non-purchase money security inter-

⁴¹⁶ 1972 OFFICIAL TEXT WITH COMMENTS § 9-313, Comment 4(a).

⁴¹⁷ 1 COOGAN, HOGAN & VAGTS § 3A.02[3], at 179.

⁴¹⁸ See note 415 *supra*. The revised version of the Code deals expressly with priorities as to future advances made under an Article 9 security agreement in contests between Article 9 secured parties, 1972 OFFICIAL TEXT WITH COMMENTS § 9-312(7), between a secured party and a buyer of the collateral, *id.* § 9-307(3), and between a secured party and a person becoming a lien creditor as to the collateral, *id.* § 9-301(4). The extent to which these provisions legitimately could be analogized to govern disputes between real estate mortgagees making future advances and holders of intervening Article 9 security interests in fixtures is questionable. However, section 9-312(7), dealing with the most nearly analogous fact situation, suggests that the mortgagee, if his mortgage was promptly recorded, would have the same priority for his future advances as he has for his first advance. In the hypothetical case posed in the text, that would support *C*'s claim to total priority over *B*.

⁴¹⁹ See part I D 6 *supra* for a discussion of this problem under the 1962 Official Text.

ests arising after the mortgage has been recorded. This protection is small comfort to mortgagees since the great majority of security interests in fixtures *are* purchase money security interests.⁴²⁰ The absence of any further protection of real estate interests in this situation presumably reflects a policy decision that mortgagees are adequately protected by their non-Code rights against the debtor and other lienors participating in the wrongful removal of the original fixtures.⁴²¹

F. *Summation*

The 1972 Official Text's treatment of security interests in fixtures embodies a series of compromises between the demands of chattel financiers and the conflicting demands of those primarily engaged in financing on the security of real estate. Consequently, the substance of its rules, from either standpoint, is not ideal. Technically it is flawed by ambiguities and omissions. Nevertheless, the 1972 Text constitutes a considerable technical improvement over the 1962 Official Text. Its rules partially meet the real estate financing community's objections to the substance of the previous text without rendering financing on the security of fixtures economically impracticable. The 1972 amendments therefore seem to merit adoption in any state which has enacted the 1962 Official Text.

IV. CONCLUSION: EFFECT OF ADOPTING THE 1972 OFFICIAL TEXT IN MISSISSIPPI

Mississippi's adoption of the 1972 Official Text, or the amendments of the former text embodied in it, would have the opposite effect than in most other states. Real estate mortgagees would lose some ground to chattel financiers. This is not necessarily an undesirable result. The 1972 Official Text strikes a balance between the competing economic groups in a way that allows both to function effectively. The present Mississippi Code, however, so far prefers real estate financiers as to make chattel financing of fixtures a hazardous business.

Moreover, in many respects the 1972 Official Text recognizes the criticisms of the 1962 Text which presumably led to Mississippi's departure from that text, and makes more felicitous adjustments between real estate and fixture financiers than has the Mississippi UCC. The 1972 Official Text also makes a number of technical improvements which do not appear in Mississippi's present Code.

⁴²⁰ Cf. 1 COOGAN, HOGAN & VAGTS § 3A.02[3], at 180.

⁴²¹ See Kripke, *supra* note 12, at 78-79.

A. Perfection Rules

A number of Mississippi's departures from the 1962 Official Text in the rules governing perfection of fixture security interests are designed to coordinate fixture filings with the state's real estate recording system. This assures title searchers the ability to find filings relating to fixtures on the land in which they are interested. The 1972 Official Text concedes the need for improvement of the UCC in this regard and takes effective steps to achieve it.

First, the revision offers an optional requirement that a financing statement intended for fixture filing contain a description of the real estate that would be "sufficient if it were contained in a mortgage of the real estate to give constructive notice of the mortgage under the law of this state."⁴²² This virtually duplicates the Mississippi Code requirement that a financing statement covering fixtures contain a legal description of the land concerned⁴²³ sufficient to "[constitute] constructive notice under the laws of this state, other than this chapter, . . . applicable to the filing or recording of real estate mortgages and deeds of trust."⁴²⁴

Further, the Mississippi UCC requires that a financing statement covering fixtures list "the name of the record owner or record lessee" of the land,⁴²⁵ apparently as a separate entry from the name of the debtor in every financing statement.⁴²⁶ The 1972 Official Text, however, specifies that for a financing statement to be sufficient for a fixture filing, it "must show the name of a record owner" if "the debtor does not have an interest of record in the real estate"⁴²⁷ This improves the Mississippi version by accomplishing the desired result without ambiguity and without going further than necessary.⁴²⁸

In addition, the present Mississippi Code's instructions to the filing officer to file or record a financing statement covering fixtures "in accordance with the requirements with respect to the filing and recording of mortgages of real estate under the laws of this state"⁴²⁹ would be replaced by specific instructions in section 9-403(7)⁴³⁰ if the 1972 Official Text were followed. This more effectively accomplishes the same pur-

⁴²² 1972 OFFICIAL TEXT WITH COMMENTS § 9-402(5).

⁴²³ MISS. CODE ANN. § 75-9-401(1), (3) (1972); see note 155 and accompanying text *supra*.

⁴²⁴ MISS. CODE ANN. § 75-9-110 (1972); see text accompanying note 164 *supra*.

⁴²⁵ MISS. CODE ANN. § 75-9-402(1) (1972); see *id.* § 75-9-402(3). See note 155 and accompanying text *supra*.

⁴²⁶ See text accompanying note 160 *supra*.

⁴²⁷ 1972 OFFICIAL TEXT WITH COMMENTS § 9-402(5).

⁴²⁸ For criticism of the Mississippi rule, see text accompanying note 159 *supra*.

⁴²⁹ MISS. CODE ANN. § 75-9-403(1); see text accompanying note 166 *supra*.

⁴³⁰ See text accompanying note 388 *supra*.

pose as the present Mississippi text by explicitly directing indexing in the name of the record owner, if such an owner is named in the financing statement.⁴³¹

Finally, the 1972 Official Text requires that a financing statement filed as a fixture filing not only show that it covers fixtures but also "recite that it is to be filed [for record] in the real estate records."⁴³² Similar requirements do not appear in Mississippi's Code, but they should be acceptable as additional assurance that the financing statement will find its way into the real estate records.⁴³³

The 1972 Official Text, as does the Mississippi UCC, makes special provision for filings covering the fixtures of utility companies. A financing statement covering the fixtures of a "transmitting utility" is exempt, under the Official Text, from the generally applicable fixture filings requirements of reciting that it is to be filed in the real estate records and describing the real estate on which the fixtures are located.⁴³⁴ Also, it is to be filed in the office of the Secretary of State rather than in each office where a mortgage on the land concerned would be filed⁴³⁵ and remains effective as a fixture filing until a termination statement is filed.⁴³⁶ Similar central filing is provided with respect to purely personal property collateral of a transmitting utility.⁴³⁷ These provisions closely parallel those of the Mississippi Act.⁴³⁸ The Mississippi statute refers to "utility companies" rather than "transmitting utilities," but the definitions are strikingly similar.⁴³⁹

The 1972 Official Text does not deal with combined mortgages in the same way as the Mississippi UCC. The state statute makes special provision for combined mortgages covering only property of "utility

⁴³¹ For criticism of the Mississippi rule, see text accompanying note 170 *supra*.

⁴³² 1972 OFFICIAL TEXT WITH COMMENTS § 9-402(5).

⁴³³ The Mississippi UCC exempts financing statements covering fixtures from the requirement of Miss. CODE ANN. § 89-3-1 (1972), that the signatures of parties to instruments filed for record be acknowledged or proved. *Id.* §§ 75-9-313(4B), -401(1)(b). There is no similar provision in the 1972 Official Text, but it would be harmonious with the "notice filing" requirement of the text to include such an exemption. See 1972 OFFICIAL TEXT WITH COMMENTS § 9-402, Comment 2.

⁴³⁴ 1972 OFFICIAL TEXT WITH COMMENTS § 9-402(5); see text accompanying note 389 *supra*.

⁴³⁵ 1972 OFFICIAL TEXT WITH COMMENTS § 9-401(5); see text accompanying note 389 *supra*.

⁴³⁶ 1972 OFFICIAL TEXT WITH COMMENTS § 9-403(b); see text accompanying note 403 *supra*.

⁴³⁷ The rules relating to perfection of security interests in property of utilities in 1972 OFFICIAL TEXT WITH COMMENTS §§ 9-402(5), -401(5) are not limited to fixtures collateral.

⁴³⁸ Miss. CODE ANN. § 75-9-302(5) (1972); see text accompanying note 193 *supra*.

⁴³⁹ Compare Miss. CODE ANN. § 75-9-302(5) (1972) (definition of "utility company"), with 1972 OFFICIAL TEXT WITH COMMENTS § 9-105(1)(a) (definition of "transmitting utility").

companies" and authorizes perfection of security interests in personal property and fixtures of such a company by the recording of a real estate mortgage which, by its terms, covers such personal property and fixtures. Further, it continues the perfection for the duration of the mortgage.⁴⁴⁰ In contrast, the Official Text deals with combined mortgages issued by debtors of any character. While it makes the recording of a real estate mortgage effective as a fixture filing to perfect a security interest in fixtures covered by the terms of the mortgage, purely personal property of the debtor is not covered by such a filing even though it is covered by the mortgage.⁴⁴¹ Finally, it continues the perfection for the life of the mortgage on the real estate.⁴⁴² The exclusion of purely personal property (nonfixtures) from the combined mortgage provisions and making the combined mortgage provisions applicable to all debtors⁴⁴³ seem to be sound policy.

The 1972 Official Text does not employ the expression "perfected against the real estate," as does the Mississippi UCC.⁴⁴⁴ Its omission, however, does not seem serious. The expression is designed to ensure that financing statements filed to perfect security interests in fixtures will adequately describe the lands concerned and be filed and indexed so as to be found in a normal real estate title search. In this respect the more specific rules reviewed above are adequate. Insofar as the expression and its definition are designed to nullify Code rules which would tolerate minor errors in filings as to fixtures, the practical impact of the "perfected against the real estate" provisions is difficult to perceive.⁴⁴⁵

The Mississippi Code requires a filing in the real estate records both to perfect and to continue the perfection of a security interest in goods which at any time become fixtures, even though they were not, and were not expected to become, fixtures either when the security interest attached or at the time of an original filing.⁴⁴⁶ The 1972 Official Text is, however, ambiguous on the point.⁴⁴⁷ From a policy standpoint, the requirement seems undesirable.⁴⁴⁸

⁴⁴⁰ MISS. CODE ANN. § 75-9-302(5) (1972); see text accompanying notes 189 through 196 *supra*.

⁴⁴¹ 1972 OFFICIAL TEXT WITH COMMENTS § 9-402(6) (1972); see text accompanying note 393 *supra*.

⁴⁴² 1972 OFFICIAL TEXT WITH COMMENTS § 9-403(6); see text accompanying note 403 *supra*.

⁴⁴³ See text accompanying note 199 *supra*.

⁴⁴⁴ MISS. CODE ANN. § 75-9-313(4A), (4B) (1972); see text accompanying note 181 *supra*.

⁴⁴⁵ See text accompanying note 191 *supra*.

⁴⁴⁶ MISS. CODE ANN. §§ 75-9-401(1)(b), -402(1), (3) (1972); see part II A 3 *supra*.

⁴⁴⁷ See text accompanying note 403 *supra*.

⁴⁴⁸ See text accompanying note 180 *supra*.

By treating "fixture filing" as but one of several methods to perfect and necessary only for priority over conflicting real estate interests other than those of lien creditors,⁴⁴⁹ the 1972 Official Text makes one major improvement in the perfection rules of both the 1962 Official Text⁴⁵⁰ and the Mississippi UCC.⁴⁵¹ Although the flexibility of the 1972 revisions is advantageous to Article 9 secured parties, the priority rules are framed so as to prevent this flexibility from harming legitimate interests of owners and encumbrancers of the real estate.

B. Priority Rules

Major differences in wording and substance exist between the priority rules of the 1972 Official Text and those of the present Mississippi UCC. Basically, the Mississippi Act is more favorable to real estate interests than the Official Text. Even though the 1972 revision of the Official Text grants greater protection to owners and encumbrancers of land than does the 1962 Text, it stops well short of the extremes found in the Mississippi Code.

The lack of parallelism between the structure of section 9-313 of the 1972 Official Text and that section of the Mississippi UCC makes detailed textual comparison difficult. Comparison in terms of substantive differences, if attempted comprehensively, would also be a lengthy undertaking. The principal discrepancies can, however, be noted.

1. Purchase Money Security Interests

The Mississippi UCC allows the holder of a purchase money security interest in fixtures no priority over holders of preexisting interests in the real estate other than those who voluntarily grant priority.⁴⁵² Under the 1972 Official Text, the holder of a purchase money security interest in fixtures can gain priority over all real estate interests which attached to the land before the goods became fixtures except construction mortgagees.⁴⁵³

Apparently, the Mississippi rule was motivated by fear that if the Article 9 security interests were given priority, holders of mortgages executed before the goods were affixed to the land would be induced by their uncertainty concerning whether the goods were subject to secret

⁴⁴⁹ See text accompanying note 369 *supra*.

⁴⁵⁰ See text accompanying note 86 *supra*.

⁴⁵¹ See notes 249 & 250 and accompanying text *supra*.

⁴⁵² MISS. CODE ANN. § 75-9-313(2) (1972); see notes 201 through 203 and accompanying text *supra*.

⁴⁵³ 1972 OFFICIAL TEXT WITH COMMENTS § 9-313(4)(a), (6); see text accompanying note 305 *supra*.

and prior liens to refuse their mortgage debtors extensions of time or other indulgences in cases of delinquency in meeting mortgage loan obligations.⁴⁵⁴ The 1972 Official Text requirement that, as a condition to attaining priority, the purchase money security interest must be perfected by fixture filing no later than 10 days after the goods become fixtures should alleviate that fear. The security interest will then no longer be a "secret" lien.

Real estate mortgagees probably would prefer to make no records search at all, and the Mississippi Code certainly relieves them of that burden. Indeed, it denies priority to the chattel financier even if the mortgagee knows of the security interest when the mortgage debtor becomes delinquent. This rule can be justified only by a policy judgment that the interests of real estate mortgages in goods affixed to the mortgaged land after the execution of their mortgages should always be preferred to those of the persons who make additions to the land possible by financing their acquisition. Such a judgment is difficult to defend. The previously developed policy argument for the purchase money priority⁴⁵⁵ seems to be a strong one.

The problems incidentally solved by the Mississippi rule are, to some extent, alleviated in other ways by the Official Text. The threat of *Moore v. Bay*⁴⁵⁶ has been thwarted by the fixture-filing requirement of section 9-313(4)(a).⁴⁵⁷ The problem of "contractors' fixtures"⁴⁵⁸ is at least reduced by the requirement of section 9-313(4)(a) that the debtor have an interest of record in the real estate or be in possession.⁴⁵⁹ The problem of "waste"⁴⁶⁰ remains unremedied in the 1972 revision,⁴⁶¹ but the necessity of a remedy is questionable.⁴⁶² While the 1972 Official Text's treatment of some of these problems is imperfect, their resolution by the drastic mortgagee-takes-all rule of the Mississippi UCC is not preferable if the objective of the law is to deal equitably with both real estate and chattel financiers.⁴⁶³

⁴⁵⁴ See text accompanying note 206 *supra*.

⁴⁵⁵ See note 28 and text accompanying note 323 *supra*.

⁴⁵⁶ See part I D 5 and text accompanying note 213 *supra*.

⁴⁵⁷ See note 313 *supra*.

⁴⁵⁸ See part I D 3 and notes 218 & 219 and accompanying text *supra*.

⁴⁵⁹ See text accompanying note 304 *supra*.

⁴⁶⁰ See part I D 6 and text accompanying notes 215 through 217 *supra*.

⁴⁶¹ See part III E 3 *supra*.

⁴⁶² See text accompanying note 148 *supra*.

⁴⁶³ The 1972 Official Text is technically clearer with regard to which real estate interests are to be considered "preexisting" than is the present Mississippi UCC. See text accompanying notes 46, 54 and 64 *supra*, regarding the ambiguity of the 1962 Official Text; text accompanying note 297 *supra*, regarding the 1972 Official Text. The Mississippi UCC follows the wording of the 1962 Official Text.

2. Non-Purchase Money Security Interests vs. Preexisting Real Estate Interests

Under the Mississippi Code, an Article 9 non-purchase money security interest is subordinate to any preexisting real estate interest unless the holder of the latter interest consents to subordination.⁴⁶⁴ This is, in effect, the general rule, subject to some exceptions, of the 1972 Official Text. The priority rule of section 9-313(4)(a) is inapplicable, and the secured party can gain priority under subsection (4)(b) only in the unlikely event that he is able to perfect his security interest by fixture filing before the interest of the real estate owner or encumbrancer is "of record." It should be noted that the same is true of a purchase money security interest if the secured party fails to perfect by fixture filing within 10 days after the collateral becomes fixtures. Exceptions made to the general rule by other provisions of section 9-313 are of very limited scope.

3. Security Interest vs. Subsequently Arising Real Estate Interests

a. Subsequent Purchasers

Persons purchasing interests in the real estate after goods which are, or are later to become, fixtures have become subject to an Article 9 security interest will typically be real estate purchasers or mortgagees. As a general rule, the security interest has priority under the Mississippi UCC.⁴⁶⁵ The priority, however, is reversed if the subsequent buyer purchases for value, without "actual notice" of the security interest, and before it has been "perfected against the real estate" by filing in the real estate records.⁴⁶⁶ The Mississippi Act is unclear both as to the meaning of "actual notice"⁴⁶⁷ and as to whether "subsequent" refers to the time the security interest attaches to the goods or the time they become fixtures where the goods are not fixtures at the time the security interest attaches.⁴⁶⁸

Under the 1972 Official Text, the governing rule will usually be the first-to-file rule of subsections (4)(b) and (7) of section 9-313.⁴⁶⁹ The ambiguity of the "subsequent" reference of the Mississippi Code is

⁴⁶⁴ MISS. CODE ANN. § 75-9-313(2), (3) (1972). See text accompanying notes 201 through 203 & 221 *supra*.

⁴⁶⁵ MISS. CODE ANN. § 75-9-313(2), (3) (1972); see text accompanying notes 221 through 225 *supra*.

⁴⁶⁶ MISS. CODE ANN. § 75-9-313(4A)(a) (1972); see text accompanying note 226 *supra*.

⁴⁶⁷ See text accompanying note 229 *supra*.

⁴⁶⁸ The Mississippi UCC follows the wording of the 1962 Official Text in this respect. See text accompanying note 47 *supra* for a discussion of the ambiguity in the 1962 Official Text.

⁴⁶⁹ See part III C 1 *supra*.

thereby eliminated. Thus, under section 9-313(4)(a), a purchase money security interest can take priority over real estate interests which arose before the goods became fixtures. An interest in the real estate arising after the goods became fixtures is, in effect, a "subsequent" interest, and the "first-to-file" rule will normally govern. The ambiguity of "actual notice" in the Mississippi Code is also avoided since notice of any sort except that given by a fixture filing becomes immaterial. The 1972 Official Text does not require the purchaser to be a purchaser "for value," but it is necessary for the purchaser to record his interest before the secured party perfects by a fixture filing. Insofar as priorities are concerned, the net effect of the 1972 Text is to give greater protection to subsequent purchasers of interests in the real estate than does the Mississippi UCC. The only requirement is that they record their acquisitions promptly.

b. Subsequent Lien Creditors

Liens on land subsequently acquired by legal or equitable proceedings, typically judgment liens, are generally subordinate to security interests in fixtures on the land under Mississippi's UCC.⁴⁷⁰ The judgment lien, however, takes priority if the creditor acquires it without "actual notice" of the security interest and before it is "perfected against the real estate."⁴⁷¹ Again, the expression "actual notice"⁴⁷² and the time reference of "subsequently"⁴⁷³ are ambiguous.

Under the 1972 Official Text, the governing rule will normally be derived from section 9-313(4)(d) and (7):⁴⁷⁴ If the Article 9 security interest is perfected by any method authorized by the Code before the lien arises, the security interest has priority. Otherwise, the lien takes priority. The ambiguity as to what constitutes a lien "subsequently obtained" is eliminated. Ambiguity of "actual notice" is avoided by making any notice except that given by perfection of the security interest irrelevant. Since lien creditors are not likely to rely on the real estate records, dispensing with the need to file a financing statement in those records as a condition of priority for the security interest is not likely to prejudice them. The revised rule's advantages to the secured party in a

⁴⁷⁰ MISS. CODE ANN. § 75-9-313(2), (3) (1972); see text accompanying notes 221 through 225 *supra*.

⁴⁷¹ MISS. CODE ANN. § 75-9-313(4A)(b) (1972); see text accompanying notes 224 through 226 *supra*.

⁴⁷² See text accompanying notes 227 through 230 *supra*.

⁴⁷³ See text accompanying note 54 *supra*, discussing the ambiguity of the 1962 Official Text. This wording is followed in the Mississippi UCC.

⁴⁷⁴ See text accompanying note 347 *supra*.

contest with the debtor's trustee in bankruptcy have been discussed previously.⁴⁷⁵

c. Subsequent Advances Under Prior Encumbrances

Under Mississippi's UCC, if a creditor with a "prior encumbrance of record on the real estate . . . makes subsequent advances," he takes priority over an intervening chattel security interest in fixtures to the extent of the subsequent advances "if the subsequent advance under the prior encumbrance is made or contracted for without actual notice of the security interest or before such security interest is perfected against the real estate."⁴⁷⁶ The ambiguity and desirability of this rule has been explored above.⁴⁷⁷

Apparently, the basic rule in the 1972 Official Text is that if a real estate mortgage containing a valid future advance clause has been recorded before a security interest in fixtures has been perfected by a fixture filing, the mortgagee will have priority over the security interest for all advances made under the mortgage. The mortgagee will have priority even though some of the advances may be made after the perfection of the security interest by fixture filing and with knowledge of the security interest. Conversely, if the security interest is perfected by fixture filing before the open-end mortgage is recorded, the security interest will have complete priority.⁴⁷⁸ While this reading is not conclusive, the draftsmen's intent⁴⁷⁹ and the sounder view of the character of the mortgagee's interest under an open-end mortgage⁴⁸⁰ dictate these results.

Section 9-313(4)(a) creates a substantial exception to the basic rule. That section grants the holder of a purchase money security interest in fixtures priority over an earlier-recorded real estate mortgage if the security interest is perfected by fixture filing before or within 10 days after the goods become fixtures. Assuming that the mortgagee's "interest" in the land will be treated as a single interest created at the time of execution of the mortgage, the purchase money priority will apply to all advances made under the mortgage.⁴⁸¹ While advances made under a

⁴⁷⁵ See text accompanying notes 356 through 360 *supra*.

⁴⁷⁶ Miss. CODE ANN. § 75-9-313(4A)(e) (1972) (emphasis added).

⁴⁷⁷ See text accompanying note 64 *supra*, discussing the ambiguities of the 1962 Official Text. The additional ambiguity injected by the use of the phrase "actual notice" instead of "knowledge" in the Mississippi UCC is discussed in the text accompanying note 229 *supra*.

⁴⁷⁸ See part III E 2 *supra*.

⁴⁷⁹ See text accompanying notes 416 & 417 *supra*.

⁴⁸⁰ See note 415 *supra*.

⁴⁸¹ See part III E 2 *supra*.

"construction mortgage" are an exception to this rule,⁴⁸² no exception is made for other mortgages securing future advances.

Acceptance of the 1972 Official Text's treatment of mortgages securing future advances poses a policy question: Should Mississippi adhere to the policy embodied in the present Mississippi UCC to protect the real estate mortgagee against intervening security interests in fixtures, even purchase money security interests, or should the state retreat from that extreme position and allow priority to purchase money security interests in fixtures except as against construction mortgagees?

The latter is preferable, since the purchase money secured party has a strong equitable claim to protection of his interest. This may make possible the increase in the value of the land by the addition of the fixtures. On the other hand, insofar as a real estate mortgagee's interest attaches to fixtures to secure his right to repayment of advances made before the goods become fixtures, he will almost always receive an unbargained-for benefit. As to any advances made thereafter, he can protect himself against disappointment by searching the real estate records for fixture filings before he makes the advance. Since only a search running back to the time of each previous search is needed, it is doubtful that the cost will be prohibitive. It is true, however, that the most thorough record search may not reveal all security interests entitled to priority. This possibility is created by the fact that the Code allows the purchase money secured party to make his fixture filing 10 days after the goods become fixtures. The occasions when such fixtures are involved, however, should be few, and inquiry of the debtor should either reveal whether they are subject to security interests or give warning of the undesirability of going ahead with the contemplated advance. Finally, a good many cases in which the purchase money security interest will have priority will be cases where the mortgagee is not seriously concerned about the rank of his claim to the fixtures in question, since they will constitute a very minor part of his security. When the risks and inconveniences to real estate mortgagees are weighed against the merits of the purchase money secured party's claim to priority, the scales tip in favor of the latter.

Even though his encumbrance is not a construction mortgage, it may be thought that a real estate mortgagee deserves priority for obligatory future advances, as distinguished from optional advances which he could withhold on learning of intervening purchase money security interests in fixtures. It has been doubted that there is such a thing as a truly obligatory advance.⁴⁸³ Further it has been suggested that any well-

⁴⁸² 1972 OFFICIAL TEXT WITH COMMENTS § 9-313(b); see part III C 3 *supra*.

⁴⁸³ 2 GILMORE § 35.4, at 926-27.

drafted contract for future advances would excuse the making of an "obligatory" advance when an intervening lien entitled to priority is discovered.⁴⁸⁴ In any event, except where a construction mortgage is involved, it is unlikely that an obligation to make future advances would be entered into in reliance on the presently nonexistent security of goods that may later be affixed to the land. The mortgagee, therefore, is deprived of no bargained-for security if his lien for future advances is subordinated to that of the secured party who financed the acquisition of the fixtures.

It is noteworthy that the rules of the 1972 Official Text have been approved by two distinguished national organizations with no axes to grind in favor of one class of financiers over another.⁴⁸⁵ Also, the revised Code's treatment of open-end mortgages has been accepted by at least 12 state legislatures,⁴⁸⁶ including one which had previously excluded all contests between real estate interests and security interests in fixtures from Code coverage.⁴⁸⁷

4. Readily Removable Fixtures

The 1972 Official Text makes special provision for security interests in fixtures which "are readily removable factory or office machines or readily removable replacements of domestic appliances which are con-

⁴⁸⁴ *Id.* § 30.6, at 829.

⁴⁸⁵ See note 6 and accompanying text *supra*.

⁴⁸⁶ As of the end of 1975, fourteen states had amended their statutes in light of the 1972 Amendments to the Official Text. With respect to the fixtures provision, five of the fourteen had adopted the revisions of the new Official Text without significant variation. ARK. STAT. ANN. § 85-9-313 (Supp. 1975); ILL. STAT. ANN. ch. 26, § 9-313 (Smith-Hurd 1974); IOWA CODE ANN. § 554.9313 (Supp. 1975); N.D. CENT. CODE ANN. § 41-09-34 (Supp. 1975); W. VA. CODE ANN. § 46-9-313 (Supp. 1975). Three more departed from the Official Text only in the treatment of utilities' fixtures which they preferred to be governed by other statutes. NEV. REV. STAT. § 104.9313 (1973); ORE. REV. STAT. § 79.3130 (1973); TEX. BUS. & COM. CODE ANN. § 9.313 (Supp. 1975). In three states, additional departures from the Official Text occurred, but their substantive impact appears small, and none made any change that appears to favor open-end mortgagees to a greater degree than the Official Text. ARIZ. REV. STAT. ANN. § 44-3134 (Supp. 1975); N.C. GEN. STAT. § 25-9-313 (Supp. 1975); WISC. STAT. ANN. § 409.313 (Supp. 1975). One state's changes indicate a concern for mortgagees making future advances but seem to protect them only in cases of filings not qualifying as fixture filings. VA. CODE ANN. §§ 8.9-313, -402(5) (Supp. 1975). California refused to adopt section 9-313 at all and retained its previous express provision that conflicts between Code security interests in fixtures and interests arising under real estate law should be governed by non-Code law. CAL. COMM. CODE § 9102(1)(c) (West Supp. 1976).

⁴⁸⁷ IOWA CODE ANN. § 554.9313 (Supp. 1975). When it originally adopted the UCC, Iowa substituted a provision that nothing in Article 9 was to govern priority between a Code security interest in fixtures and any real estate interest.

sumer goods.”⁴⁸⁸ A security interest in such fixtures has priority over all conflicting real estate interests if the security interest is “perfected by any method permitted by this Article” before the goods become fixtures.⁴⁸⁹ No comparable rule appears in the Mississippi UCC.

Here the Official Text tolerates a remnant of the “secret lien,” which appears to have been one of the principal reasons for Mississippi’s departure from the 1962 Official Text.⁴⁹⁰ It is, however, a very modest and justifiable remnant since real estate grantees and mortgagees ordinarily would not expect their interests to extend to such goods and, by the nature of the goods, are given warning of the possibility of chattel security interests in them which are not filed in the real estate records.⁴⁹¹

5. Tenants’ “Fixtures”

The 1972 Official Text grants priority to even an unperfected security interest over any conflicting real estate interest if the debtor has a right, as against the real estate claimant, to remove the fixtures from the land.⁴⁹² Though this provision has no counterpart in the Mississippi UCC, it should not be objectionable. Indeed, it is basically an expression of the principle that a person should be able to transfer what he has. If the debtor would have a right against his landlord or a mortgagee to remove fixtures, he should be able to grant a security interest in those fixtures which carries with it the same privilege.

While the Official Text continues the secured party’s priority “for a reasonable time after the debtor’s right of removal terminates,” the continuation is amply justified by a need to allow time for the secured party to learn of the termination of the debtor’s right of removal and to take steps to enforce his security interest. An accomplishment of the treatment of tenants’ “fixtures” in the 1972 Text is to clarify the priorities between Code security and real estate interests without otherwise disturbing the law relating to such “fixtures.”

6. Summation

If the 1972 Official Text version were adopted, the major changes in the priority rules of section 9-313 that would be made in Mississippi’s UCC would be that (1) purchase money security interests in fixtures could gain priority over preexisting interests in the real estate without the consent of the holders of such interests, and (2) holders of open-end

⁴⁸⁸ 1972 OFFICIAL TEXT WITH COMMENTS § 9-313(4)(a).

⁴⁸⁹ *Id.*; see part III C 4 *supra*.

⁴⁹⁰ See text accompanying note 187 *supra*.

⁴⁹¹ See part III C 4 *supra*.

⁴⁹² See part III C 6 *supra*.

real estate mortgages would not be assured of priority over intervening encumbrances on fixtures if they made advances without checking the real estate records notices of such encumbrances. The rules of the 1972 Official Text are preferable since they strike a more equitable balance between the legitimate but conflicting interests of chattel and real estate financiers.

C. *The Removability Rule*

The 1972 Official Text⁴⁹³ continues, with insignificant change, the rule of the 1962 Text⁴⁹⁴ that when a security interest in fixtures has priority over all interests in the real estate, the secured party may, upon the debtor's default, remove the fixture. He must, however, reimburse the owners and encumbrancers of the real estate other than the debtor for any physical damage to the real estate. It is not necessary to reimburse any reduction in the value of the real estate caused by the absence of the fixtures or the necessity of replacing them. This rule is not in the Mississippi Code.⁴⁹⁵

The interpretative problems raised by the omission of the removability rule from the Mississippi UCC have been investigated above.⁴⁹⁶ Assuming the Mississippi version is read as forbidding removal without the consent of all owners and encumbrancers of the real estate other than the debtor, there is little to justify it, as the priority rules of section 9-313 are thus rendered virtually meaningless.

The apparent motivation for the omission of subsection (5) from section 9-313 of the Mississippi UCC was to protect real estate mortgagees from diminution of the value of their security without compensation. This is evident since both subsection (5) and the corresponding subsection (8) of the 1972 Text authorize removal of fixtures collateral without liability for reduction in the value of the real estate as a functioning economic unit.⁴⁹⁷ Complete prohibition of removal obviously goes farther than necessary to guard against such consequences. Requiring the secured party to pay for such reduction in the going value of the realty would be a complete remedy. It is inferrable from the retention of the removability rule of the 1962 Text, however, that the draftsmen of the 1972 revisions felt that real estate mortgagees are not justified in demanding even that much. Where the security interest has

⁴⁹³ 1972 OFFICIAL TEXT WITH COMMENTS § 9-313(8); see text accompanying note 289 *supra*.

⁴⁹⁴ 1962 OFFICIAL TEXT WITH COMMENTS § 9-313(5); see text accompanying note 72 *supra*.

⁴⁹⁵ For a discussion of the effect of the omission, see part II C *supra*.

⁴⁹⁶ See text accompanying notes 243 & 244 *supra*.

⁴⁹⁷ See text accompanying note 241 *supra*.

priority over preexisting real estate interests because it is a purchase money interest, any increase in the going value of the real estate resulting from the addition of the fixtures to the land will usually be a windfall benefit to holders of preexisting real estate interests. Moreover, removal of the fixtures will damage their bargained-for security only to the extent that physical damage to the real estate is caused by the removal of the fixtures. In cases of real estate interests arising after the goods have become fixtures, the security interest will usually have priority, if at all, because the real estate interests were acquired with notice of the security interest and hence with notice of the possibility of removal and consequent reduction in the value of the property.⁴⁹⁸ These arguments are indicative of the fairness of the rule as it appears in the Official Text.

D. The Meaning of "Fixtures"

The 1972 Official Text embodies the same concept of "fixtures" as the 1962 Official Text.⁴⁹⁹ Also, except for the elimination of the removability rule, which may aid in determining whether goods affixed to land have become fully real estate,⁵⁰⁰ the Mississippi UCC follows the 1962 Official Text with regard to what are "fixtures."⁵⁰¹ There appears to be no reason why the concept of "fixtures" employed by the revised text should be objectionable in Mississippi.

It should be pointed out again, however, that the Code concept of "fixtures" is not identical to that of Mississippi's pre-Code cases.⁵⁰² One suspects that some of the opposition to the UCC treatment of security interests in fixtures arises from a failure to appreciate this distinction and from an assumption that "fixtures" for Code purposes are whatever pre-Code cases declared to be "fixtures." One who makes that assumption would be likely to read Article 9's priority rules as enabling Article 9 secured parties to take away affixations to land in circumstances where pre-Code cases would have forbidden such removal. If the Code is read as its draftsmen intended and as a careful reading of its text dictates, such would not be the case. Indeed, under the 1972 Official Text, chattel security interests in goods affixed to land would generally be given less favored treatment than was true under Mississippi's pre-Code case law.

For example, in the hypothetical case posed in the text above in-

⁴⁹⁸ See Hawkland, *supra* note 3, at 44-45.

⁴⁹⁹ With regard to the concept of "fixtures" embodied in the 1962 Official Text, see part I A *supra*. Regarding the 1972 Official Text concept, see part III A *supra*.

⁵⁰⁰ See note 15 & text accompanying notes 282 through 284 *supra*.

⁵⁰¹ Miss. CODE ANN. § 75-9-313(1) (1972); see text accompanying notes 262 through 265 *supra*.

⁵⁰² See note 501 *supra*.

volving installation of irrigation equipment, subject to a purchase money interest,⁵⁰³ where a contest developed between the conditional seller of the goods and the holder of a preexisting mortgage, Mississippi's pre-Code case law would have allowed the conditional seller to repossess the equipment even though he had never filed notice of his security interest. Apparently, he could do so without liability to the mortgagee for any damage done to the real estate by the removal of the goods.⁵⁰⁴ Under the 1962 Official Text of the UCC, the conditional seller would have a right of removal without filing but would be obliged to pay the mortgagee for any physical damage done to the real estate.⁵⁰⁵ Under the 1972 Official Text, the conditional seller's right of removal would depend on his making a fixture filing before or within 10 days after the equipment was installed on the land⁵⁰⁶ and on his reimbursing the mortgagee for any physical damage caused to the land by the removal.⁵⁰⁷ The pre-Code case law reached a conclusion by deciding that the goods were not "fixtures." Under the two Official Texts of the Code, they would be "fixtures," but the secured party's right of removal would not only be designed to protect the mortgagee's interest but would also be more stringently conditional under the 1972 Text than under its predecessor.

E. Summation

The conclusion to which this study has led the writer is clearly signaled by the preceding comparison of the present Mississippi UCC and the 1972 Official Text. While neither treatment of security interests in fixtures is flawless, the Official Text is both a better draft than the Mississippi Act and expressive of sounder policy. It is hoped that the Mississippi Legislature will draw the same conclusion and accept the fixtures provisions of the 1972 Official Text.

⁵⁰³ See text accompanying notes 268 through 270 *supra*.

⁵⁰⁴ See *Layne Central Co. v. Gulf Coast Ice Co.*, 171 Miss. 94, 157 So. 84 (1934).

⁵⁰⁵ 1962 OFFICIAL TEXT WITH COMMENTS § 9-313(2), (5).

⁵⁰⁶ 1972 OFFICIAL TEXT WITH COMMENTS § 9-313(4)(a).

⁵⁰⁷ *Id.* § 9-313(8).

THE POPULATION APPORTIONMENT PRINCIPLE: ITS DEVELOPMENT AND APPLICATION TO MISSISSIPPI'S STATE AND LOCAL LEGISLATIVE BODIES

Thomas Vocino, John H. Morris,** and D. Steve Gill****

In 1962, the United States Supreme Court initiated what many consider the most popular enterprise of the turbulent Warren Court era, reapportionment. The purpose of reapportionment is to ensure that each citizen's vote receives equal weight in determining general election results. Historically the apportionment controversy may be divided conveniently into three periods: the generally unresponsive era prior to 1962; the precedent-setting decisions of the Supreme Court in the early and middle 1960's; and the subsequent application of the one-man, one-vote rule to local government units. This article addresses the origins and development of the apportionment controversy, emphasizing its impact upon state and local legislative bodies. Special emphasis will be accorded Mississippi's involvement in the apportionment quagmire.

I. STATE LEGISLATIVE REAPPORTIONMENT

A. *Development of the One-Man, One-Vote Doctrine*

Until the nineteenth century, urban areas contained only a small minority of the United States' population. As a result, rural areas established early control of state governments. Over the years, however, the relative percentage population of rural areas declined as urban population steadily increased.¹

Most state constitutions required that legislatures reapportion

* B.S. 1964, M.S. 1965, University of Wisconsin-Milwaukee; PH.D. 1973, Southern Illinois University.

** B.A. 1956, Memphis State University; M.P.A. 1975, Auburn University at Montgomery.

*** Staff Member, *Mississippi Law Journal*.

¹ The following table portrays the population shift from rural areas to the cities.

themselves on a population basis after each decennial census.² State legislatures, however, were reluctant to perform this duty. The rapid growth of urban areas at the turn of the century threatened both partisan and rural majorities with a loss of political power should reapportionment be effected. Consequently, these majority groups employed three methods of preventing a realization of the constitutional mandate: a simple refusal on the part of the legislature or other apportioning bodies to act; occasional reapportionment which fell short of providing districts of equal population; and, enactment of state constitutional amendments requiring bases of apportionment other than population.³ These maneuvers successfully prevented urban interests from achieving equitable apportionment, and attempts to gain judicial relief proved equally unrewarding.⁴

A significant early blow to those interests favoring population apportionment of legislative districts came in the 1946 United States Supreme Court decision in *Colegrove v. Green*.⁵ Contesting the validity of

TABLE 1 — *Urban and Rural Population Characteristics*

1790-1970

Census Date	Percentage of Total Population	
	Urban	Rural
1790	5.1	94.9
1850	15.3	84.7
1900	39.6	60.4
1920	51.2	48.8
1950	64.0	36.0
1960	69.9	30.1
1970	73.5	26.5

Source: U.S. BUREAU OF THE CENSUS, CENSUS OF POPULATION: 1970, CHARACTERISTICS OF THE POPULATION, 1-42, Part 1, Table 3.

² See, e.g., ALA. CONST. art. 9, §§ 199, 200; ARK. CONST. art. 8, §§ 1-5; VA. CONST. art. 4, § 43.

³ M. JEWELL, *THE STATE LEGISLATURE* 18 (2d ed. 1969); cf. G. BAKER, *THE REAPPORTIONMENT REVOLUTION* 25 (1966).

⁴ See Comment, *Apportionment: Past and Future*, 33 MONT. L. REV. 101, 103-04 (1971); Note, *The Reapportionment Cases—An End to Judicial Restraint*, 16 S.C.L. REV. 506 (1964).

⁵ 328 U.S. 549 (1946), noted in 18 MISS. L.J. 170 (1946); 56 YALE L.J. 127, 139-40 (1946).

Illinois' 1901 State Apportionment Act,⁶ which authorized the Illinois Legislature to establish congressional election districts, the plaintiffs in *Colegrove* claimed the statute violated various provisions of the United States Constitution, including the equal protection clause of the fourteenth amendment.⁷ The Illinois Legislature had not reapportioned its congressional election districts since 1901 despite subsequent population shifts resulting in separate districts representing from 112,116 to 914,053 citizens.⁸ Plaintiffs argued that because they resided in the heavily populated districts, their vote was less effective than the votes of those persons living in less populated districts.⁹ The Court refused to grant relief since "equality in population of [Congressional] districts"¹⁰ was *not* required and the issue was nonjusticiable.¹¹ Mr. Justice Frankfurter viewed the controversy of apportionment and representation as a "political" question:

We are of opinion that the petitioners ask of this Court what is beyond its competence to grant. This is one of those demands on judicial power which cannot be met by verbal fencing about "jurisdiction." It must be resolved by considerations on the basis of which this Court, from time to time, has refused to intervene in controversies. It has refused to do so because due regard for the effective working of our government revealed this issue to be of a peculiarly political nature and therefore not meet for judicial determination.¹²

An interesting aspect of this decision is that the vote on the substantive matter of the court's jurisdiction over the controversy was actually three-one-three.¹³ Mr. Justice Rutledge reasoned that while the

⁶ ILL. REV. STAT. ch. 46, §§ 154-56 (1945). The state election districts were as inequitable as the congressional districts. The implication was that it was in the interest of the state legislature not to reapportion the congressional districts. *Colegrove v. Green*, 328 U.S. 549, 567 (1946) (Black, J., dissenting).

⁷ 328 U.S. at 550-51.

⁸ *Id.* at 567 (Black, J., dissenting). The 1901 apportionment scheme was based on the Federal Census of 1900. Each decennial census from 1910 to 1940 indicated not only an increase in the population of Illinois, but also "a substantial shift in the distribution of population among the districts established in 1901." *Id.*

⁹ *Id.*

¹⁰ *Id.* at 551, quoting *Wood v. Broom*, 287 U.S. 1, 8 (1932).

¹¹ The Court stated that under the Declaratory Judgment Act the test for determining whether a federal court has authority to make a declaration such as is here asked, is whether the controversy "would be justiciable in this Court if presented in a suit for injunction."

328 U.S. at 552 (citations omitted).

¹² *Id.*

¹³ In writing the plurality decision, Mr. Justice Frankfurter was joined by Mr. Justices Reed and Burton. *Id.* at 549. Mr. Justice Rutledge concurred, *id.* at 564, while Mr. Justice Jackson took no part in the case. *Id.* at 556. In a dissent, Mr. Justice Black was

Court had jurisdiction over the controversy, it was inappropriate to grant relief due to the impending 1946 Illinois congressional election.¹⁴ Thus, Justice Rutledge's concurrence might lead to the supposition that, under appropriate circumstances, the federal courts would assume jurisdiction in other apportionment and districting controversies. Later cases, however, proved to the contrary.¹⁵ The principle of judicial non-intervention was increasingly in issue after the 1950 census revealed substantial shifts in population.¹⁶ During the 1950's, the law reviews mounted a significant challenge to these decisions.¹⁷ Meanwhile, state legislatures either neglected or refused to take meaningful action towards reapportionment. As a result, the nation entered the 1960's with only one-third of the electorate holding the power to elect a majority of the seats in over one-half of the state senates and two-fifths of the lower houses.¹⁸ In 14 states, less than 20 percent of the electorate could elect either one house or both.¹⁹

Until March of 1962, Mr. Justice Frankfurter's warning against entering the "political thicket"²⁰ generally had been heeded.²¹ Then, in

joined by Mr. Justices Douglas and Murphy. *Id.* at 566, 574.

¹⁴ *Id.* at 565 (Rutledge, J., concurring).

¹⁵ In *MacDougall v. Green*, 335 U.S. 281 (1948), *overruled by Moore v. Ogilvie*, 394 U.S. 814, 816-19 (1969), and *South v. Peters*, 339 U.S. 276 (1950), *overruled by Gray v. Sanders*, 372 U.S. 368 (1963), the *Colegrove* doctrine of non-intervention in state regulation of apportionment procedures seemed controlling. *MacDougall* upheld an Illinois statutory requirement that petitions to place new political parties on the ballot have a minimum of 200 signatures of the qualified voters from at least 50 of the state's 102 counties. 335 U.S. at 282-83. The Court in *South* upheld Georgia's county unit system of government. In a per curiam opinion the majority in *South* stated:

Federal courts consistently *refuse* to exercise their equity powers in cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions.

339 U.S. at 277 (emphasis added).

¹⁶ See, e.g., *Anderson v. Jordon*, 343 U.S. 912 (1952); *Cox v. Peters*, 67 S.E.2d 579 (Ga. 1951), *appeal dismissed*, 342 U.S. 936 (1952).

¹⁷ See, e.g., Lewis, *Legislative Apportionment and the Federal Courts*, 71 HARV. L. REV. 1057 (1958); *Symposium-Legislative Reapportionment*, 17 LAW & CONTEMP. PROB. 253-469 (1952). See generally R. HANSON, *THE POLITICAL THICKET* 47 (1966).

¹⁸ M. JEWELL, *supra* note 3, at 17.

¹⁹ *Id.*

²⁰ *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

²¹ For example, in a 1958 challenge to the 1913 Minnesota Legislative Redistricting Act, the district court in *Magraw v. Donovan*, 163 F. Supp. 184 (D. Minn. 1958), declined to address the issues presented, including its power to grant relief, "in order to afford the Legislature full opportunity to 'heed the constitutional mandate to redistrict!'" *Id.* at 187 (citation omitted).

Two years later, however, the Supreme Court ruled that an Alabama statute redefining the boundaries of the city of Tuskegee unconstitutionally disenfranchised local black voters. *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). Mr. Justice Frankfurter took care to distinguish this case from *Colegrove*. *Id.* at 346-47.

Baker v. Carr,²² the Court took a divergent view toward apportionment and representation controversies. The Tennessee constitution required that state legislative districts be reapportioned on a number-of-qualified voters basis every 10 years.²³ At the time of suit, the most recent reapportionment had taken place 51 years earlier.²⁴ Baker and other residents of Nashville asserted that the 1901 apportionment statute denied them equal protection of the law under the fourteenth amendment. They pointed out that their votes were statistically equal to only a fraction of rural votes. Baker asked the Court to restrain Tennessee officials from conducting any further elections under the allegedly unconstitutional statute. He further requested that, unless the legislature enacted a valid apportionment law, the district court reapportion the Tennessee General Assembly, applying formulae contained in the Tennessee constitution.²⁵ Alternatively, he sought to have the state legislators elected at large.²⁶

The Supreme Court reversed the district court's dismissal and remanded the case for further proceedings.²⁷ Writing for the majority, Mr. Justice Brennan found that the federal courts had jurisdiction over the controversy, that the appellants had standing to sue, and that they were entitled to appropriate relief. The majority, however, failed to develop standards to guide the lower courts in future apportionment controversies. With regard to the "political question" issue, Mr. Justice Brennan reasoned that a suit which seeks to protect a political right does not necessarily raise a nonjusticiable political question.²⁸ He further pointed out that as "a tool for the maintenance of governmental order," the political question doctrine would "not be . . . applied to promote only disorder."²⁹

In a lengthy and vigorous dissent, Mr. Justice Frankfurter cautioned that the court was treading on dangerous ground by assuming authority over the legislative function of apportionment.³⁰ He argued that in a democracy relief had to come from the "popular feeling,"³¹ and that the Court should remain aloof from political clashes.³²

²² 369 U.S. 186 (1962).

²³ *Id.* at 188-89.

²⁴ *Id.* at 187-88.

²⁵ *Id.* at 195.

²⁶ *Id.*

²⁷ *Baker v. Carr*, 369 U.S. 186, 237 (1962), *rev'g* 179 F. Supp. 824 (M.D. Tenn. 1959) (per curiam).

²⁸ 369 U.S. at 214-15.

²⁹ *Id.* at 215.

³⁰ *Id.* at 277 (Frankfurter, J., dissenting).

³¹ *Id.* at 267.

³² *Id.*

Immediately after *Baker*, the courts entertained suits challenging the constitutionality of state apportionment schemes.³³ While the lower courts approved plans drawn to achieve more equitable population apportionment, these new plans did not begin to approach population equality within districts. Absent any firm standards from the Supreme Court, a variety of reapportionment plans proved acceptable to the courts.³⁴

One scheme challenged during this period involved the county unit system used in Georgia's statewide party primaries. This suit, *Gray v. Sanders*,³⁵ was brought by citizens of Fulton County (Atlanta). At the time of suit, Fulton County was represented by six (1.46 percent) of the total 410 county units, although 14.11 percent of the state population resided there.³⁶ Having established at the trial that Echols County had 938 residents and one unit vote, as opposed to Fulton County which had over 500,000 residents and only six votes, the plaintiffs argued that "one resident in Echols [County] had an influence in the nomination of candidates equivalent to ninety-nine residents of Fulton County."³⁷ Declaring the county unit system violative of the fourteenth amendment's equal protection clause,³⁸ the Court stated: "Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote"³⁹ The one-man, one-vote doctrine had arrived.

In the year following *Gray*, the Court rendered the single most significant apportionment decision in the area of state legislative reapportionment. In *Reynolds v. Sims*,⁴⁰ Alabama residents filed a complaint in federal district court alleging deprivation of their rights under the Alabama constitution and the equal protection clause of the fourteenth amendment.⁴¹ The 1901 Alabama constitution prescribed that both houses of the state legislature were to be reapportioned on a population basis every 10 years.⁴² Except for the creation of an additional

³³ See, e.g., *Valenti v. Dempsey*, 211 F. Supp. 911 (D. Conn. 1962); *Lisco v. McNichols*, 208 F. Supp. 471 (D. Colo. 1962). See generally R. HANSON, *supra* note 17, at 57.

³⁴ For an analysis of the numerous cases evidencing a disparity of standards see McKay, *Political Thickets and Crazy Quilts: Reapportionment and Equal Protection*, 61 MICH. L. REV. 645, 706-10 (1963). See also Comment, *supra* note 4, at 108.

³⁵ 372 U.S. 368 (1963).

³⁶ *Id.* at 371.

³⁷ *Id.*

³⁸ *Id.* at 379-80.

³⁹ *Id.* at 379.

⁴⁰ 377 U.S. 533 (1964).

⁴¹ *Sims v. Frink*, 208 F. Supp. 431 (M.D. Ala. 1962), *rev'd sub nom.*, *Reynolds v. Sims*, 377 U.S. 533 (1964).

⁴² ALA. CONST. art. 9, §§ 199-200 (1901).

county in 1903, no reapportionment had taken place since 1901.⁴³ Disparate population growth from 1901 to 1962 had created substantial population inequalities among state legislative districts.⁴⁴

The district court initially refrained from acting to afford the Alabama Legislature an opportunity to take corrective action.⁴⁵ After subsequently rejecting two reapportionment plans adopted by the legislature, the court, however, enjoined state officials from conducting future elections under any of the invalid plans.⁴⁶

On appeal, the Supreme Court, in a majority opinion written by Mr. Chief Justice Warren, held that under the equal protection clause, "seats in both houses of a bicameral state legislature must be apportioned on a population basis."⁴⁷ The Chief Justice elaborated that each district had to be "as nearly of equal population as is practicable."⁴⁸ In a frequently quoted phrase, Chief Justice Warren stated: "Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests."⁴⁹ The rationale employed in the *Reynolds* decision has been characterized by the following analytical sequence:

State legislatures are the chief ingredient of representative government; representative government is essentially self-government; self-government is participation; participation is usually manifested through voting; the concept of equal protection requires similar treatment of those similarly situated with regard to the government action; therefore equal protection demands that seats in both houses of the state legislature be apportioned on a population basis to prevent dilution of the vote.⁵⁰

Five other challenges to state legislative apportionment schemes were decided on the same day as *Reynolds*. In each instance, the Court held that both houses of a state legislature had to be apportioned on a population basis.⁵¹

In the early 1970's, the Supreme Court struggled to formulate a

⁴³ *Reynolds v. Sims*, 377 U.S. 533, 540 (1964).

⁴⁴ *Id.* at 539-40.

⁴⁵ *Id.* at 540.

⁴⁶ *Id.* at 552.

⁴⁷ *Id.* at 568.

⁴⁸ *Id.* at 577.

⁴⁹ *Id.* at 562.

⁵⁰ 39 TUL. L. REV. 349, 352-53 (1965).

⁵¹ *Lucas v. Colorado Gen. Assembly*, 377 U.S. 713 (1964)(Colorado); *Romas v. Sincok*, 377 U.S. 695 (1964)(Delaware); *Davis v. Mann*, 377 U.S. 678 (1964)(Virginia); *Maryland Comm. for Fair Representation v. Tawes*, 377 U.S. 656 (1964)(Maryland); *WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1964)(New York).

state legislative reapportionment standard. Should there be a strict, absolute equality principle, as applied in congressional redistricting cases,⁵² or should there be a more flexible standard for state legislative redistricting schemes devised on the basis of legitimate state interests? The Court seemingly indicated a preference for the former in *Ely v. Klahr*,⁵³ where it declared a maximum population deviation of 16 percent unacceptable under a strict equality standard. In *Ely*, plaintiffs challenged an Arizona legislative reapportionment plan which guaranteed each county one representative in the state legislature's lower house. The Court noted that the lower court⁵⁴ properly held the plan invalid since the Arizona Legislature had concluded that a 16 percent deviation was the lowest achievable and consequently made no effort to ensure greater equality.⁵⁵ However, the Court's continued uncertainty as to the proper handling of election cases once again became apparent in a series of 1973 decisions.

The seminal case, *Mahan v. Howell*,⁵⁶ involved the pertinence of political subdivision lines in establishing state legislative districts.⁵⁷ The question arose from a statutory provision⁵⁸ apportioning districts for the purpose of electing the Virginia House of Delegates. For the most part, the districts had been drawn so as to maintain existing political subdivision boundaries.⁵⁹ This plan created districts with a deviation from the ideal population variance of 16.4 percent—a deviation the plaintiff claimed was impermissible under the equal protection clause.⁶⁰ The Court held the 16.4 percent variance within constitutional boundaries since "legitimate considerations incident to the effectuation of a rational state policy" existed.⁶¹ Since the passage of legislation affecting

⁵² In congressional redistricting cases, the Supreme Court has applied and remained firmly attached to a rigid one-man, one-vote rule requiring mathematical exactitude. See *White v. Weiser*, 412 U.S. 783 (1973)(deviations must be unavoidable and as mathematically equal as reasonably possible); *Wells v. Rockefeller*, 394 U.S. 542 (1969)(preservation of regional interests does not justify variances in population); *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969) (state must make good faith effort to achieve precise mathematical equality); *Wesberry v. Sanders*, 376 U.S. 1 (1964)(one man's vote is to be worth as much as another's). See also *Connor v. Johnson*, 386 U.S. 483 (1967)(per curiam), *aff'g* 279 F. Supp. 619 (S.D. Miss. 1967)(Mississippi's congressional districts satisfy one-man, one-vote standards).

⁵³ 403 U.S. 108 (1971).

⁵⁴ *Klahr v. Williams*, 313 F. Supp. 148 (D. Ariz. 1970).

⁵⁵ 403 U.S. at 111.

⁵⁶ 410 U.S. 315 (1973).

⁵⁷ *Id.* at 319-20.

⁵⁸ VA. CODE ANN. § 24.1-12.1 (Supp. 1972).

⁵⁹ 410 U.S. at 319-20.

⁶⁰ *Id.* at 317-18.

⁶¹ *Id.* at 325, *quoting* *Reynolds v. Sims*, 377 U.S. 533, 579 (1964).

single communities would be facilitated by maintaining the integrity of political subdivision lines, the deviation was permissible.⁶² Finally, the Court noted that although there could be no set formula for determining permissible variances, the population discrepancies under consideration approached but did not surpass an intolerable limit.⁶³ As a result of *Mahan*, two distinct redistricting standards were established: (1) a strict, absolute equality standard for congressional redistricting; and (2) a more flexible standard for state legislative redistricting based upon a legitimate state interest.

In a similar case, *Gaffney v. Cummings*,⁶⁴ the Court further departed from *Ely*'s strict, one-standard principle. The plan challenged in *Gaffney* provided for 36 single-member senatorial districts with a maximum deviation of 1.81 percent from the ideal and 151 single-member house seats with a maximum deviation of 7.83 percent.⁶⁵ Based on a "political fairness" principle, the scheme was designed to reflect the relative strength of major political parties by creating "safe" and "swing" districts for each.⁶⁶ The plan was attacked as both a political gerrymander⁶⁷ in favor of the Republican Party and a violation of the equal protection clause.⁶⁸ Writing for a six-man majority, Mr. Justice White stated that such minor mathematical deviations did not constitute prima facie "invidious discrimination" under the equal protection clause; moreover, the state was not required to justify such deviations.⁶⁹ Justice White wrote further that the "political fairness" principle was not invidiously discriminatory.⁷⁰

In a companion case, *White v. Regester*,⁷¹ the Court held, *inter alia*, that a 9.9 percent total maximum deviation was insufficient to establish a prima facie denial of equal protection.⁷² Under a proposed reapportionment plan for the 150-member Texas house, 79 representatives were to be elected from single-member districts and the remainder from 11 multi-member districts.⁷³ While the Texas plan constituted an unconsti-

⁶² See 410 U.S. at 325-26.

⁶³ *Id.* at 328-29.

⁶⁴ 412 U.S. 735 (1973).

⁶⁵ *Id.* at 737.

⁶⁶ *Id.* at 751-54.

⁶⁷ The term "gerrymander" is sometimes used to describe any politically motivated districting whether affecting the physical form of the district or their comparative populations. See Lewis, *supra* note 17, at 1059.

⁶⁸ 412 U.S. at 738-39.

⁶⁹ *Id.* at 741.

⁷⁰ *Id.* at 751-53.

⁷¹ 412 U.S. 755 (1973), *aff'g* 343 F. Supp. 704 (W.D. Tex. 1972).

⁷² The Court also pointed out that the average deviation of all house districts from the ideal was 1.8 percent. 412 U.S. at 764.

⁷³ *Id.* at 758.

tutional diminution of Negro and Mexican-American votes,⁷⁴ the Court found no prima facie discrimination in the population variances.⁷⁵ The Court noted, however, that a total deviation in excess of 9.9 percent would probably have to be justified by a rational state policy.⁷⁶

Considered collectively, these decisions establish three categories of state legislative reapportionment cases: (1) those with very large variances;⁷⁷ (2) those with deviations large enough to require state justification but which could be justified and legally sustained;⁷⁸ and (3) those with deviations so small that no prima facie case under the equal protection clause is established.⁷⁹ Clearly, considerable change had occurred since *Reynolds*'s simple one-man, one-vote dictum. Although previous decisions indicated that permissible deviations had to be supported by rational justification, deviations below 10 percent among state voting districts seemed constitutionally insignificant.

B. Reapportionment of the Mississippi Legislature

As evidenced by the previous section, the development of a constitutional doctrine to govern state legislative reapportionment has not been a simple matter. To further complicate the matter, federal courts entering Mississippi's "political thicket" were confronted with a complexity of issues far surpassing those addressed in prior cases. The Mississippi apportionment dilemma thus precipitated one of the most complex and enduring struggles faced by any state since the inception of the apportionment controversy.

1. History of the Litigation

Apportionment of the Mississippi Legislature was first challenged on the basis of alleged noncompliance with the newly developed one-man, one-vote doctrine. The now extant 10-year-old case evolving from that challenge, *Connor v. Johnson*,⁸⁰ has made subsequent quadrennial

⁷⁴ *Id.* at 765-70; see note 150 and accompanying text *infra*.

⁷⁵ 412 U.S. at 764.

⁷⁶ *Id.* Chapman v. Meier, 420 U.S. 1 (1975), the latest Supreme Court decision in this area, is discussed in the text accompanying notes 137 through 142 *infra*.

⁷⁷ *Reynolds v. Sims*, 377 U.S. 533 (1964).

⁷⁸ *Mahan v. Howell*, 410 U.S. 315 (1973).

⁷⁹ *White v. Regester*, 412 U.S. 755 (1973).

⁸⁰ 256 F. Supp. 962 (S.D. Miss. 1966), *supplemented*, 265 F. Supp. 492 (1967); 330 F. Supp. 506, *motion granted*, 402 U.S. 690, *on remand*, 330 F. Supp. 521, *stay denied*, 403 U.S. 928 (1971), *vacated and remanded sub nom.*, *Connor v. Williams*, 404 U.S. 549 (1972), *after filing of amended complaint*, *Connor v. Waller*, 396 F. Supp. 1308, *rev'd*, 95 S. Ct. 2003 (1975), *on remand*, *Connor v. Waller*, Civil No. 3830 (A)(S.D. Miss., July 11, 1975); *Connor v. Finch*, Civil No. 3830(A)(S.D. Miss., Aug. 24, 1976).

legislative elections confusing and uncertain. In the initial challenge, a three-judge district court found no rational explanation for the flagrant population variances among Mississippi Senate and House districts.⁸¹ The constitutional and statutory apportionment provisions were found violative of the equal protection clause and, therefore, invalid under the supremacy clause.⁸² Deeming state legislative reapportionment a "vital legislative function,"⁸³ the court directed the Mississippi Legislature to reapportion itself by December 1, 1966.⁸⁴

Responding to the court's directive, a special session of the Mississippi Legislature convened on November 9, 1966.⁸⁵ The product of that session, Senate Bill No. 1504, received gubernatorial approval on December 1, 1966, within the judicially imposed time-table.⁸⁶ Citing "glaring variations" from the norm in both the senate⁸⁷ and house⁸⁸ plans, the United States District Court for the Southern District of Mississippi declared the legislation "unconstitutional on its face, null and void."⁸⁹ Asserting that it had "no alternative . . . to doing that which [it had] tried so hard to avoid,"⁹⁰ the court then proceeded to dictate a reapportionment plan for the 1967 legislative elections.⁹¹ In drawing the plan, the court stated:

In doing this we simply consider the State of Mississippi as a "big

⁸¹ *Connor v. Johnson*, 256 F. Supp. 962, 966 (S.D. Miss. 1966). At the time of suit, the reapportionment plans for the house and senate were based on Miss. CONST. art. 13, §§ 254, 255 (1890), *as amended*, ch. 57, [1962] Gen. Laws Miss., 2d Ex. Sess. 119. 256 F. Supp. at 967.

⁸² 256 F. Supp. at 967. The house plan required that each county have one representative and the remaining 40 members of the 122 member house were to be divided among the more populous counties. *Id.* at 965. The senate plan divided the state into 49 districts from which 52 senators were elected. *Id.* at 965-66. The more populous counties were each allotted one senator while less populated counties were "combined for the purpose of electing a senator from the combined territory." *Id.* at 965. A majority of the house could conceivably be elected by counties having only 40.361 percent of the state population, and a majority of the senate from districts having 37.199 percent of the state's total population. *Id.* at 965-66.

⁸³ *Id.* at 967; *see Chapman v. Meier*, 420 U.S. 1 (1975); *Toombs v. Fortson*, 241 F. Supp. 65 (N.D. Ga. 1965).

⁸⁴ 256 F. Supp. at 968.

⁸⁵ *Connor v. Johnson*, 265 F. Supp. 492, 493 (S.D. Miss. 1967).

⁸⁶ *Id.* at 493.

⁸⁷ The court noted that 25 of the 41 senatorial districts deviated in excess of 10 percent, with some deviations reaching as high as 32.55 percent. *Id.*

⁸⁸ Over 40 percent of the house districts varied "by more than ten percent" and some presented such "widespread margins" as 41.60 percent, 34.87 percent, and 33.81 percent. *Id.*

⁸⁹ *Id.* at 494.

⁹⁰ *Id.*

⁹¹ *See id.* at 495-97 for graphic illustrations of the court-ordered plan.

house" which must, in one instance be divided into 52 rooms containing substantially the same number of occupants and, in the other must be divided into 122 rooms. This has to be done, of course, within immovable exterior boundaries and within permissible tolerances.

This can be done only through the use of county boundaries and county population figures. Being predominantly a rural state, Mississippi has no other useful population measuring stick.⁹²

The court further noted that the "overpowering consideration . . . has been to make the election districts as nearly equal as possible in population, without discrimination or favoritism of any kind."⁹³

Subsequently, the legislature opted not to take any further action until 1971. In that year, with the benefit of recently published 1970 federal census data, the legislature again passed reapportionment legislation.⁹⁴ This most recent plan, however, like its predecessors, failed to evade the critical eye of the federal courts. In *Connor v. Johnson*,⁹⁵ the court stated that

[p]opulation is the *starting* point for consideration and is the *controlling* criterion for judgment in legislative reapportionment controversies. The fundamental principle of representative government in this country is that there must be equal representation for equal numbers of people, without regard to race, sex, economic status or place of residence within the State ⁹⁶

While the legislation apparently attempted to cure unacceptable population deviations by increasing the size of the house and senate,⁹⁷ the court found both over and under-representation in several districts for which no "rational basis" was offered.⁹⁸ Considering these factors and the immediacy of state elections, the court revised the distribution of seats in both houses but attempted "to interfere as little as possible with what the Legislature [had] done."⁹⁹ Although the court expressed some distaste for multiple member districts, the population sparcity of some counties required combining some counties "to achieve that degree of population equality required by the Constitution."¹⁰⁰ While single-

⁹² *Id.* at 494.

⁹³ *Id.*

⁹⁴ *Connor v. Johnson*, 330 F. Supp. 506, 507 (S.D. Miss. 1971).

⁹⁵ *Id.*

⁹⁶ *Id.* at 507 (citation omitted).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 508-18.

¹⁰⁰ *Id.* at 509. Based on 1970 census data, the court computed that the population norm for one senate seat was 46,633 people and 18,171 people for each house seat. *Id.* at 508. On that basis, only a fraction over 13 percent of the counties had a sufficient population to elect one senator, while 51 percent could elect a representative. *Id.* at 509.

member districts would have been "ideal," they were not created in Hinds, Harrison and Jackson counties.¹⁰¹ The court rationalized that since the June 4 filing deadline was fast approaching, it did not have the time necessary "to obtain dependable data, population figures, boundary locations, etc. so as fairly and correctly to divide these counties into 'single-member districts.'"¹⁰²

On appeal, however, the Supreme Court entered a stay order and instructed the district court, "absent insurmountable difficulties," to devise and implement a single-member districting plan for the election of five senators and twelve representatives from Hinds County.¹⁰³ Within 48 hours, the district court held an evidentiary hearing to initiate compliance with their mandate.¹⁰⁴ After reviewing the evidence and the report of a special master appointed on June 8, 1971,¹⁰⁵ the court found

nothing in the evidence . . . or even in the argumentative exceptions of the plaintiffs [that would have shown] anybody in search for the truth that single member districts for [the] legislative offices in Hinds County [could] be created with any reliable and dependable evidence in [the] record as support therefor.¹⁰⁶

The court certified the results to the United States Supreme Court, which declined to interfere with the decision.¹⁰⁷ The 1971 legislative elections were therefore conducted with minimal delay.

Anticipating the 1975 elections, the Mississippi Legislature reapportioned itself in 1973.¹⁰⁸ Though suit was filed on April 19, 1973, to contest the new plan, the three-judge court did not consider the consti-

¹⁰¹ *Id.* at 519. The three counties mentioned constituted the only counties which elected 4 or more representatives. *Id.*

¹⁰² *Id.* The court, however, revealed its intention to appoint a special master by January 1, 1972, to determine the feasibility of implementing single member districts in Hinds, Harrison and Jackson counties before the 1975 elections. *Id.*

¹⁰³ *Connor v. Johnson*, 402 U.S. 690, 692 (1971). In a strong dissent Mr. Justice Black, joined by Mr. Chief Justice Burger and Mr. Justice Harlan, was appalled by this "eleventh hour" command.

Any candidate would be dumbfounded by the thought that his old district had suddenly been abolished on the eve of the filing date and he must now run in a new but unspecified district which is still only a dream in the eyes of the United States Supreme Court sitting a thousand miles from Hinds County.

Id. at 693-94 (Black, J., dissenting).

¹⁰⁴ *Connor v. Johnson*, 330 F. Supp. 521, 522 (S.D. Miss. 1971).

¹⁰⁵ *Id.* at 522-23.

¹⁰⁶ *Id.* at 523. Accordingly, the court extended the June 4, 1971, filing deadline until noon, June 19, 1971. *Id.*

¹⁰⁷ *Connor v. Johnson*, 403 U.S. 928 (1971).

¹⁰⁸ Act of April 6, 1973, ch. 456, [1973] Gen. Laws Miss. 584 (repealed 1975); Act of April 6, 1973, ch. 457, [1973] Gen. Laws Miss. 584 (repealed 1975).

tutionality of that legislation until February 7, 1975.¹⁰⁹ Before any decision was rendered, the 1975 legislature, heeding the recent teachings of *Chapman v. Meir*¹¹⁰ that reapportionment was primarily the duty and responsibility of the state legislatures,¹¹¹ passed a new reapportionment plan.¹¹² The three-judge court then dismissed all prior proceedings without prejudice and considered the constitutionality of the 1975 Reapportionment Acts.¹¹³

The 1975 plan was challenged on the following grounds: (1) the legislature failed to submit the proposed plan to the United States Attorney General as required by Section 5 of the Voting Rights Act of 1965;¹¹⁴ (2) the legislative districts were malapportioned in violation of the one-man, one-vote rule;¹¹⁵ and (3) the plan discriminatorily diluted black voting power and operated to deny the plaintiffs equal and effective participation in the legislative election.¹¹⁶ A discussion of each individual element of the plaintiff's challenge will be beneficial to a more complete understanding of the problem.

2. Section 5 of the Voting Rights Act of 1965

Any application of the one-man, one-vote principle to an apportionment of Mississippi legislative bodies, whether state or local, necessarily involves consideration of the Voting Rights Act of 1965.¹¹⁷ Any governmental unit which utilized a literacy "test or [similar voter qualification] device and had less than a 50 percent turnout in the 1964 or 1968 presidential election"¹¹⁸ was subjected to the strictures of the Act. As of April 1974, the Act's provisions encompassed the southern states of Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia.¹¹⁹

Under section 5, each governmental unit covered by the act is required to submit any alteration in voting qualifications, procedures, or

¹⁰⁹ *Connor v. Waller*, 396 F. Supp. 1308, 1310 (S.D. Miss. 1975).

¹¹⁰ 420 U.S. 1 (1975).

¹¹¹ *Id.* at 27; see *Maryland Comm. v. Tawes*, 377 U.S. 656 (1964); *Reynolds v. Sims*, 377 U.S. 533, 586 (1964).

¹¹² Miss. CODE ANN. §§ 5-1-1, -3 (Supp. 1975).

¹¹³ *Connor v. Waller*, 396 F. Supp. 1308, 1311 (S.D. Miss. 1975).

¹¹⁴ *Id.* at 1325-26.

¹¹⁵ *Id.* at 1309. The house plan resulted in a 19.7 percent maximum deviation and the senate plan resulted in an 18.9 percent maximum deviation. Brief for Defendants at 5, *Connor v. Waller*, 396 F. Supp. 1308 (S.D. Miss. 1975).

¹¹⁶ 396 F. Supp. at 1309.

¹¹⁷ 42 U.S.C. § 1973c (1970).

¹¹⁸ UNITED STATES COMMISSION ON CIVIL RIGHTS, *THE VOTING RIGHTS ACT: TEN YEARS AFTER* 13 (1975).

¹¹⁹ *Id.* at 51 (table 6).

practices to either the United States District Court for the District of Columbia or the United States Attorney General for a determination as to whether the new enactment has either the purpose or effect of denying or abridging the right to vote on account of race or color. Such federal clearance is a condition precedent to enforcement of new voting procedures.¹²⁰

The *Connor v. Waller*¹²¹ three-judge court sustained Mississippi's 1975 Reapportionment Acts against all constitutional challenges. Claiming that the 1975 Acts were not presented to the United States Attorney General under the requirements of section 5, the Justice Department appealed.¹²² The three-judge court, having specifically retained jurisdiction to pass on the validity of any future reapportionment plan, had found submission of the legislation to the Attorney General unnecessary.¹²³ The court's ruling was based on the Supreme Court's 1972 exclusion of reapportionment plans implemented by the federal courts from the purview of section 5.¹²⁴

On June 5, 1975, the Supreme Court reversed, holding that the 1975 Reapportionment Acts "are not now and will not be effective as laws until and unless cleared pursuant to section 5."¹²⁵ The Court apparently

¹²⁰ *Id.* at 25.

¹²¹ 396 F. Supp. 1308 (S.D. Miss. 1975).

¹²² *Connor v. Waller*, 421 U.S. 656 (1975).

¹²³ *Connor v. Waller*, Feb. 7, 1975, Bench Opinion, Trs. 39. See also 265 F. Supp. 962 (S.D. Miss. 1966), wherein the court had assumed jurisdiction 10 years earlier.

¹²⁴ See *Connor v. Johnson*, 402 U.S. 690, 691 (1972).

¹²⁵ *Connor v. Waller*, 421 U.S. 656 (1975). But cf. *Connor v. Johnson*, 402 U.S. 690 (1972); *Zimmer v. McKeithen*, 467 F.2d 1381 (5th Cir. 1972), *rev'd on other grounds*, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd sub nom.*, *East Parish School Bd. v. Marshall*, 96 S. Ct. 1083 (1976); *Sheffield v. Itawamba County Bd. of Supervisors*, 439 F.2d 35 (5th Cir. 1971). In *Zimmer*, the United States Court of Appeals for the Fifth Circuit addressed the section 5 question posed in *Connor*. The court-ordered plan required the submission of a 1971 at-large election plan for district court approval and adoption. The 1971 plan, which changed from ward to at-large elections, was identical to a 1968 court-ordered plan. Although the plan approved by the district court was identical to the plan adopted and submitted by the Parish, the court held that since the 1971 plan was prompted by a court order and scrutinized by the district court in regard to the one-man, one-vote rule and allegations of racial discrimination, neither the 1971 plan nor the decree were subject to section 5 of the Voting Rights Act of 1965. In reaching this conclusion, the court stated:

What we have here is an adversary action, invoking the equity jurisdiction and the equitable adjudication of the District Court. As the Supreme Court succinctly said in *Conner v. Johnson* . . . and as this Court said in *Sheffield v. Itawamba County Board of Supervisors* . . . *court ordered plans* resulting from equitable jurisdiction over adversary proceedings are not controlled by Section 5. If this were not so, the exercise of jurisdiction by the courts would be meaningless. The Attorney General has no authority to review or to set aside the judgments of courts duly entered in the exercise of their jurisdiction over the parties and the subject matter.

was saying that only those plans actually designed and implemented by a federal court under its general equity powers escape section 5 requirements.¹²⁶

3. One-Man, One-Vote and the 1975 Plan

In reversing the May 19, 1975, district court decision in *Connor*, the Supreme Court stated:

This reversal is, however, without prejudice to the authority of the District Court, if it should become appropriate, to entertain a proceeding to require the conduct of the 1975 elections pursuant to a court-ordered reapportionment plan that complies with this Court's decisions in *Mahan v. Howell*, . . . *Connor v. Johnson*, . . . and *Chapman v. Meier*, ...¹²⁷

Therefore, in formulating a new plan for the 1975 election of the Mississippi Legislature, the three-judge court looked to these three cases for guidance.

*Connor v. Williams*¹²⁸ was an appeal from a court-ordered plan for the 1971 Mississippi legislative elections. The Supreme Court vacated the judgment of the lower court, "except insofar as it applied to the already passed 1971 elections," and remanded the case so that Hinds, Harrison, and Jackson counties might be divided into single-member districts.¹²⁹ The Court ascribed importance to the fact that under the 1971 plan, 25 of the 122 members of the house of representatives were elected at-large from these three multi-member districts.¹³⁰ *Mahan v. Howell*,¹³¹ as previously discussed,¹³² stood for the proposition

that in devising a court ordered plan for state legislative reapportionment the federal courts may not disregard an undoubted state policy

467 F.2d at 1383. The Supreme Court found it unnecessary to discuss whether section 5 procedures must be complied with. In a footnote, the Court said that section 5 did not apply. 96 S. Ct. 1083, 1085 n.6 (1976).

¹²⁶ The Supreme Court felt that the district court was implementing the plan under authority from the 1975 Reapportionment Acts, and not under the court's equity powers. The Court denied the petition for special relief because of the disruption in state government that would result from a delayed legislative election. Letter from Giles W. Bryant, Special Assistant Attorney General for the State of Mississippi, to D. Steve Gill, Jan. 15, 1976.

¹²⁷ 421 U.S. at 656-57.

¹²⁸ 404 U.S. 549 (1972).

¹²⁹ *Id.* at 552.

¹³⁰ *Id.* at 551 n.3.

¹³¹ 410 U.S. 315 (1973).

¹³² See text accompanying note 56 *supra*.

of maintaining the integrity of traditional county boundaries if population variances are not excessive.¹³³

In the reapportionment of a state legislature, deviations from the population norm are no longer judged by the strict standards governing congressional redistricting.¹³⁴ Under *Mahan*, the test is whether the apportionment scheme establishes districts of "as nearly of equal population as is practicable"¹³⁵ and is based upon legitimate state interests.

In *Chapman v. Meier*,¹³⁶ the Supreme Court noted that where the issue of impermissible population deviation in state legislative reapportionment is raised, "each case must be evaluated on its own facts, and . . . a particular population deviation from the ideal may be permissible in some cases but not in others"¹³⁷ *Chapman* involved the constitutionality of a federal court-ordered reapportionment of the North Dakota Legislative Assembly. The plan called for implementation of multi-member districts and contained a 20 percent population variance between the largest and smallest districts.¹³⁸ Since North Dakota had traditionally used single-member districts for legislative reapportionment, the Court reasoned that the district court should have refrained from imposing multi-member districts upon the state.¹³⁹ Single-member districts would always be "preferred" in court-ordered reapportionment plans in the absence of a significant state interest supporting a departure from this general rule.¹⁴⁰ In relation to the one-man, one-vote rule, the Court announced two divergent standards for evaluating population variances in reapportionment plans:

A court-ordered plan . . . must be held to higher standards than a State's own plan. With a court plan, any deviation from approximate population equality must be supported by enunciation of historically significant state policy or unique features. We have felt it necessary in this case to clarify the greater responsibility of the District Court, when devising its own reapportionment plan.

We hold today that unless there are persuasive justifications, a court-ordered reapportionment plan of a state legislature must avoid use of multimember districts, and, as well, must ordinarily achieve the

¹³³ *Connor v. Waller*, Civil No. 3830, at 5 (S.D. Miss., July 8, 1975).

¹³⁴ See notes 52, 77 through 79 *supra*.

¹³⁵ *Mahan v. Howell*, 410 U.S. 315, 324-25 (1973).

¹³⁶ 420 U.S. 1 (1975).

¹³⁷ *Id.* at 18.

¹³⁸ *Id.* at 11, 22.

¹³⁹ *Id.* at 21.

¹⁴⁰ *Id.* at 18. See generally *East Carroll Parish School Bd. v. Marshall*, 96 S. Ct. 1083 (1976); *Connor v. Johnson*, 402 U.S. 690 (1972).

goal of population equality with little more than *de minimis* variation. *Where important and significant state considerations rationally mandate departure from these standards, it is the reapportioning court's responsibility to articulate precisely why a plan of single-member districts with minimal population variance cannot be adopted.*¹⁴¹

On July 11, 1975, with the 1975 Mississippi elections imminent, the three-judge court implemented its own plan for the reapportionment of the Mississippi Legislature and, as directed by the Supreme Court, attempted to apply the dictates of *Mahan*, *Connor*, and *Chapman*.¹⁴² The court's plan breached county boundaries in only two instances¹⁴³ and implemented some multi-member districts.¹⁴⁴ Under *Chapman*, the population variance within the plan had to be justified by some "historically significant state policy."¹⁴⁵ Finding such a rational state policy weighing against the exclusive use of single-member districts, the district court stated:

[F]rom the beginning of Statehood, for 148 years, Mississippi has traditionally, historically, and constitutionally adhered to an unswerving policy of preserving the integrity of county boundaries, of using the county as the sole, basic unit of state government, and as the jurisdiction from which it elected its legislators.

Under the teachings of *Mahan v. Howell*, recognized in *Chapman v. Meier*, we hold that in the enforcement of the one person-one vote rule (where no racial discrimination in voting is involved) this Court should respect this 148 year old policy and should be lead to breach it for only the most compelling reasons.¹⁴⁶

The district court did, however, order a division of Hinds, Harrison, and Jackson counties into single-member house districts.¹⁴⁷

4. Dilution of Black Voting Strength and the 1975 Plan

In ordering the 1975 plan, the district court rejected plaintiff's contention that the composition of certain legislative districts impermissibly canceled, minimized, or diluted black voting strength.¹⁴⁸ Before dis-

¹⁴¹ 420 U.S. at 26, 27 (emphasis added).

¹⁴² *Connor v. Waller*, Civil No. 3830, at 2 (S.D. Miss., July 8, 1975).

¹⁴³ The district court crossed county boundaries in the formation of two house districts. House District 47 was composed of George County, Supervisor District 4 of Greene County, and Supervisor District 5 of Stone County. House District 28A was composed of beats 2 and 3 of Madison County and beat 2 of Rankin County. *Connor v. Waller*, Civil No. 3830(A) at 39, 43 (S.D. Miss., July 11, 1975).

¹⁴⁴ *Id.* at 34-43.

¹⁴⁵ *Chapman v. Meier*, 420 U.S. 1, 26 (1975).

¹⁴⁶ *Connor v. Waller*, Civil No. 3830, at 12 (S.D. Miss., July 8, 1975).

¹⁴⁷ *Id.* at 21; see MISS. CODE ANN. § 5-1-1 (Supp. 1975).

¹⁴⁸ *Connor v. Waller*, Civil No. 3830(A), at 4-5 (S.D. Miss., July 11, 1975).

cussing the court's rationale, it will be helpful to survey the policy considerations and implications of multi-member districts as well as the major Supreme Court decisions in the area.

A multi-member district permits the at-large election of all representatives allotted to a given district. In contrast, a single-member district is a smaller, individual sub-district which elects its own representatives. When a voter participates in a multi-member district election, his vote influences the election of more than one legislator. Some disparity inevitably exists between a voter's power in a multi-member district and a voter's power in a single-member district.¹⁴⁹ As a matter of political reality, a legislator is often more responsive to the demands of the majority of voters who voted for him. Consequently, a "voter who chooses a winner has a greater weight in the legislature than one who chooses a loser."¹⁵⁰ The use of multi-member districts "results inevitably in the wasting of votes" and often handicaps a minority party or group.¹⁵¹ The pertinent inquiry, however, is whether a person's right to vote is unconstitutionally impaired by a districting plan which minimizes his chances of electing a legislator of his choice.

No representative system of government can ensure the representation of every distinct interest within a given district, nor does any racial or political group have a constitutional right to be represented in proportion to its percentage of the total population.¹⁵² Some patterns of districting, however, may dilute the effectiveness of a substantial minority so severely, and perhaps so deliberately, as to constitute invidious discrimination. The standard for determining whether the use of multi-member districts in a state legislative reapportionment plan unconstitutionally submerges a minority group has evolved from several Supreme Court decisions.

The first post-*Baker* case to mention multi-member districts was *Reynolds v. Sims*.¹⁵³ In *Reynolds*, the Court attempted to demonstrate that its decision—both houses of a state legislature must be apportioned

¹⁴⁹ See generally Banzhaf, *Multi-Member Electoral Districts—Do They Violate the "One-Man, One-Vote" Principle?*, 75 YALE L.J. 1309 (1966).

¹⁵⁰ Jewell, *Minority Representation: A Political or Judicial Question*, 53 KY. L.J. 267, 268-69 (1965). As metropolitan counties continue to elect an increasing number of legislators, "the problems of representation will increasingly become problems of districting within [those counties] rather than apportionment among counties." *Id.* at 288. See also Jewell, *Local Systems of Representation: Political Consequences and Judicial Choices*, 36 GEO. WASH. L. REV. 790 (1968).

¹⁵¹ Jewell, *Minority Representation: A Political or Judicial Question*, *supra* note 150, at 269.

¹⁵² *Wallace v. House*, 515 F.2d 619, 630 (5th Cir. 1975); see, e.g., *Perry v. City of Opelousas*, 515 F.2d 639 (5th Cir. 1975).

¹⁵³ 377 U.S. 533 (1964). See text accompanying note 40 *supra*.

on a population basis—did not spell the end of bicameralism.¹⁵⁴ The Court stated that differences “in the composition and complexion” of the two houses of a state legislature could be maintained by a number of devices, including the use of “at least some multi-member districts” in one of the legislative houses.¹⁵⁵ In a companion case, *Lucas v. Forty-Fourth General Assembly*,¹⁵⁶ the Court, merely noting the undesirability of multi-member districts, stated:

We do not intimate that apportionment schemes which provide for the at-large election of a number of legislators from a county, or any political subdivision, are constitutionally defective. Rather, we merely point out that there are certain aspects of electing legislators at large from a county as a whole that might well make the adoption of such a scheme undesirable to many voters residing in multimember counties.¹⁵⁷

In 1965, the Court rendered a leading decision on the constitutionality of multi-member districts. In *Fortson v. Dorsey*,¹⁵⁸ a federal district court in Georgia had granted summary judgment for plaintiffs who alleged that the use of multi-member districts in populous Georgia counties resulted in invidious discrimination.¹⁵⁹ Citing their recent decision in *Reynolds*, the United States Supreme Court reversed and declared the Georgia scheme constitutional.¹⁶⁰ The Court warned, however, that although the use of a multi-member district plan was not per se unlawful,¹⁶¹ such a plan might be declared unconstitutional if it operated to

¹⁵⁴ 377 U.S. at 576-77. “Single-member districts may be the rule in one State, while another State might desire to achieve some flexibility by creating multi-member or floater districts.” *Id.* at 579 (footnotes omitted).

¹⁵⁵ *Id.* at 576-77.

¹⁵⁶ 377 U.S. 713 (1964).

¹⁵⁷ *Id.* at 731 n.21. The Court then listed the objectionable features of multi-member districts: (1) they necessitate long and cumbersome ballots which make intelligent choice difficult for the voters; (2) “[n]o identifiable constituencies within the populous counties [result]”; and (3) residents of the more populous counties have “no single member . . . elected specifically to represent them.” *Id.* at 731. See also *Drew v. Scranton*, 379 U.S. 40 (1964), *vacating and remanding* 229 F. Supp. 310 (M.D. Pa. 1964). Although the Supreme Court reversed, the district court’s formulation of the minority submergence theory was the earliest judicial recognition of the problem:

Minority groups living in particular localities may well be submerged in elections at large but can often make their voting power much more effective in the smaller single-member district in which they live.

229 F. Supp. at 327.

¹⁵⁸ 379 U.S. 433 (1965), *rev’g* 228 F. Supp. 259 (N.D. Ga. 1964).

¹⁵⁹ 228 F. Supp. at 261.

¹⁶⁰ *Fortson v. Dorsey*, 379 U.S. 433, 437-38 (1965).

¹⁶¹ *Id.* at 438-39; see *Kelly v. Bumpers*, 413 U.S. 901 (1973), *aff’g* 340 F. Supp. 568 (E.D. Ark. 1972)(multi-member districts not *per se* racially discriminatory); *Klahr v.*

"minimize or cancel out the voting strength of racial or political elements of the voting population."¹⁶² The Court would protect the voting power of a minority group only upon a showing that its power was being submerged by a particular apportionment scheme.¹⁶³ Plaintiffs in *Fortson* failed to make such a showing. One year later, in *Burns v. Richardson*,¹⁶⁴ the Supreme Court clarified both the quantity and quality of proof necessary to overturn a multi-member district plan. The Court stated that proof of either intent or effect would suffice to invalidate an apportionment scheme which statistically diluted minority voting power.¹⁶⁵

Seemingly, *Fortson* and *Burns* indicated that multi-member districts would be invalidated if the proof established a scheme which "designedly or otherwise . . . would operate to minimize or cancel out the voting strength of racial or political elements of the voting population."¹⁶⁶ In *Whitcomb v. Chavis*,¹⁶⁷ however, the Court found the plaintiffs' failure to show that Indiana's apportionment scheme "*denied [them] access to the political system*"¹⁶⁸ fatal to their attempt to establish the unconstitutionality of the scheme. In *Whitcomb*, the Court was concerned only with a minority party's or group's access and opportunity to participate in the legislative elections. The Court characterized the cancellation of voting strength as a result of the use of multi-member districts as a "mere euphemism for political defeat at the polls."¹⁶⁹ Significantly, no evidence showed that Blacks had been regularly excluded from either major political party slate or that they had not been allowed "to register to vote, to choose the political party they desired to support, to participate in its affairs or to be equally represented on those occa-

Williams, 339 F. Supp. 922 (D. Ariz. 1972)(single-member districts not required). *But see* *Kruidenier v. McCulloch*, 258 Iowa 1121, 1147-48, 142 N.W.2d 355, 370-71, *cert. denied*, 385 U.S. 851 (1966).

¹⁶² 379 U.S. at 439.

¹⁶³ *Id.*

¹⁶⁴ 384 U.S. 73 (1966).

¹⁶⁵ *Id.* at 88-89. The Court suggested that the following factors might be explored to satisfy the burden of proof:

It may be that this invidious effect can more easily be shown if, in contrast to the facts in *Fortson*, districts are large in relation to the total number of legislators, if districts are not appropriately subdistricted to assure distribution of legislators that are resident over the entire district, or if such districts characterize both houses of a bicameral legislature rather than one.

Id. at 88. *See also* *Kilgarlin v. Hill*, 386 U.S. 120, 121 (1967) (per curiam), *affirming in part on the issue of proof sub nom.*, *Kilgarlin v. Martin*, 252 F. Supp. 404 (S.D. Tex. 1966).

¹⁶⁶ *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965).

¹⁶⁷ 403 U.S. 124 (1969).

¹⁶⁸ *Id.* at 155 (emphasis added).

¹⁶⁹ *Id.* at 153.

sions when legislative candidates were chosen.”¹⁷⁰ In the eyes of the Court, the plaintiffs’ complaint was reduced to a dissatisfaction with “the disaster of losing too many elections.”¹⁷¹ More than a simple disproportionality between the voting potential and the number of legislative seats won by a racial or political group must exist to overturn a legislative scheme.¹⁷² The measure of the constitutionality of any apportionment plan should be whether all voters have an “equal opportunity to participate in and influence the selection of candidates”¹⁷³ The Court felt that the plaintiffs’ theory of securing fair and effective legislative representation for any distinct interest group “numerous enough to command at least one seat and [representing] a majority living in an area sufficiently compact to constitute a single-member district” was potentially too broad.¹⁷⁴ Such a principle would open the court to complaints of submergence from any sizable interest group occupying identifiable areas and “at the very least . . . spawn endless litigation.”¹⁷⁵

Whitcomb, however, cannot be read as overruling *Fortson* and *Burns*. The Supreme Court will continue to protect minority groups from enactments controlling any part of the elective process which intentionally or effectively results in racial discrimination.¹⁷⁶ *Whitcomb* is not controlling where state policy favoring multi-member or at-large districting schemes is rooted in racial discrimination.¹⁷⁷ The recent Mississippi case of *Stewart v. Waller*¹⁷⁸ exemplifies this proposition. In *Stewart*, a three-judge court looked both to the purpose and effect of a 1962 legislative enactment concerning the election of municipal aldermen.¹⁷⁹ Prior to 1962, cities having a population of over 10,000 were required to elect their aldermen by wards.¹⁸⁰ The 1962 Act¹⁸¹ mandated

¹⁷⁰ *Id.* at 149. In assessing the opportunity of members of the group to participate in the political process, the Supreme Court viewed the case in terms of each person’s right to participate rather than the group’s right to participate effectively. *See id.*

¹⁷¹ *Id.* at 153.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 156.

¹⁷⁵ *Id.* at 157.

¹⁷⁶ *See City of Richmond v. United States*, 422 U.S. 358 (1975).

¹⁷⁷ *Zimmer v. McKeithen*, 485 F.2d 1297, 1305 (5th Cir. 1973) (en banc), *aff’d sub nom.*, *East Carroll Parrish School Bd. v. Marshall*, 96 S.Ct. 1083 (1976). Compare *Whitcomb v. Chavis*, 403 U.S. 124, 143-44 (1971), with *Graves v. Barnes*, 343 F. Supp. 704, 725 (W.D. Tex. 1972), *aff’d sub. nom.*, *White v. Regester*, 412 U.S. 755 (1973). *See also Taylor v. McKeithen*, 407 U.S. 191, 194 n.3 (1972); Derfner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV., 523, 553-55 (1973).

¹⁷⁸ 404 F. Supp. 206 (N.D. Miss. 1975).

¹⁷⁹ *Id.* at 213.

¹⁸⁰ *See Ann. Miss. Code* § 3374-36 (1942), *repealed*, *Miss. CODE ANN.* § 21-3-7 (1972), *reinstated by court order Stewart v. Waller*, 404 F. Supp. 206 (N.D. Miss. 1975). *See note 184 infra.*

at-large aldermanic elections in most municipalities, regardless of population. While the proof showed conspicuous race-suppressing features formed the basis for the new statute,¹⁸² no proof was offered to show a counter-balancing nondiscriminatory goal in changing from ward to at-large elections.¹⁸³ The court declared the act an invalid device which purposefully and actually furthered racial discrimination in the Mississippi voting processes.¹⁸⁴ In reaching its decision, the court relied on *Fortson*, *Burns*, and *Whitcomb*.¹⁸⁵

With the continued vitality of *Fortson* and *Burns*, why does the Supreme Court support multi-member districts against charges of unconstitutional dilution of minority or partisan voting strength? The boundaries of legislative districts is essentially a political question involving the structure of the legislature, the nature of the legislative parties, and the struggle of various interests for political power. Multi-member districts serve numerous legitimate state interests. Many legislatures apparently view multi-member districts as a means of achieving population equality under *Reynolds* while retaining representation for a political unit which, as a whole, is larger than a single-member district.¹⁸⁶ Multi-member districts may also ensure the representation of interests that otherwise might go unarticulated, *i.e.*, city or area-wide interests.¹⁸⁷ Further, there is the problem of determining whether the specific minority group is politically distinct and cohesive. It is not always clear whether members of a minority group consistently share sufficiently similar voting interests to justify treating them as a cognizable group for reapportionment purposes. Obviously, there could be changes in the voting interests and political will of any cohesive group. As stated in *Whitcomb*, the possibility of political disputes arising between different factions or groups to gain legislative seats argues strongly for judicial caution in assessing claims of racial submergence and in formulating remedies.¹⁸⁸

Considering these policy matters and applicable Supreme Court decisions, the United States District Court for the Southern District of Mississippi, on July 11, 1975, rejected the claim of invidious discrimina-

¹⁸¹ See MISS. CODE ANN. § 21-3-7 (1972).

¹⁸² 404 F. Supp. at 214.

¹⁸³ *Id.* at 213-15.

¹⁸⁴ *Id.* at 214. The Mississippi statute relating to aldermanic elections which existed prior to passage of section 21-3-7 was declared to be in full force and effect as if section 21-3-7 never had been enacted. *Id.* at 219.

¹⁸⁵ *Id.* at 213.

¹⁸⁶ Carpeneti, *Legislative Apportionment: Multimember Districts and Fair Representation*, 120 U. PA. L. REV., 666, 696 (1972).

¹⁸⁷ *Id.*

¹⁸⁸ *Whitcomb v. Chavis*, 403 U.S. 124, 157 (1969).

tion in the use of any multi-member districts and implemented a temporary apportionment plan for Mississippi's 1975 legislative elections.¹⁸⁹ The court found the evidence offered by the plaintiffs in *Connor*¹⁹⁰ insufficient to show that blacks were being denied access to Mississippi's political system.¹⁹¹ Further, the court noted that

[t]he existence of a black population majority is not dispositive of the dilution issue, for it is not population but access to the political process that determines whether an interest group enjoys the full vigor of its political rights.¹⁹²

In implementing its plan, the court found that black citizens were not suffering from past discrimination and "[were] not hindered, hampered or in any way impeded in registering to vote, or in voting, for candidates of their individual choice."¹⁹³ The court concluded that

[a]s a matter of fact, it is obvious that the Voting Rights Act of 1965 has effectually reduced all such racially discriminatory factors to what honestly may be determined an irreducible minimum.¹⁹⁴

Recognizing that Mississippi's policy of using multi-member districts was of ancient origin and did not arise from racially discriminatory motives, the court stated:

Chapman points out that "the preference for and emphasis upon single-member districts in court-ordered plans" was reaffirmed in *Mahan v. Howell* but proceeded to point out that when a plan is court-ordered "there often is no state policy of multi-member districting which might deserve respect or deference. Indeed, if the court is imposing multi-member districts upon a state which always has employed single-member districts, there is special reason to follow the *Conner* rule favoring the latter type of districting." . . . *[W]e hardly see how a federal court would have any more right to deprive a state of its multi-member policy in a one person-one vote context, especially where necessary to preserve the integrity of county boundaries.*

¹⁸⁹ *Connor v. Waller*, Civil No. 3830(A), at 5 (S.D. Miss., July 11, 1975).

¹⁹⁰ *Connor v. Waller*, 396 F. Supp. 1308 (S.D. Miss. 1975).

¹⁹¹ *Connor v. Waller*, Civil No. 3830 (A), at 5 (S.D. Miss., July 11, 1975).

¹⁹² *Id.* at 7.

¹⁹³ *Id.* at 5. In *White v. Regester*, 412 U.S. 755 (1973), however, rather than overturn an intense local appraisal by the district court, the Supreme Court upheld a finding that Blacks and Mexican-Americans were effectively removed from the political processes because of the use of multi-member districts. *Id.* at 767.

¹⁹⁴ *Connor v. Waller*, Civil No. 3830(A), at 5 (S.D. Miss., July 11, 1975), quoting 396 F. Supp. 1308, 1326 (1975).

We do not understand *Chapman* to have in any way modified the basic principles of *Mahan*, especially since *Mahan* is cited with approval for the handling of population divergences "based on legitimate considerations incident to the effectuation of a rational state policy."¹⁹⁵

As previously noted, the court-ordered plan for the 1975 legislative elections was only temporary. The district court instructed the parties to submit plans for a permanent reapportionment of the Mississippi Legislature within 90 days.¹⁹⁶

On May 19, 1976, after the district court attempted to defer further hearings on the permanent plan pending resolution of three pertinent cases,¹⁹⁷ the Supreme Court ordered it to

schedule a hearing to be held within 30 days on all proposed permanent reapportionment plans . . . to be applicable to the election of legislators in the 1979 quadrennial elections, and also ordering any necessary special elections to be held to coincide with the November 1976 Presidential and congressional elections, or in any event at the earliest practicable date thereafter.¹⁹⁸

With this directive, the district court released a permanent reapportionment plan for the Mississippi Senate on August 24, 1976.¹⁹⁹ Although the decision on what special elections would be needed and the permanent plan for the House of Representatives would be handed down later in a supplemental decree,²⁰⁰ the court answered the question of multi-member districts. All remaining multi-member districts were dissipated and the state was divided into single-member legislative districts. In an effort to end this long-running controversy and restore stability to the Mississippi Legislature, the court completely ignored the long-standing state policy of multi-member districts²⁰¹ and, in order to

¹⁹⁵ *Connor v. Waller*, Civil No. 3830, at 6 (S.D. Miss., July 8, 1975)(emphasis added).

¹⁹⁶ *Connor v. Waller*, Civil No. 3830(A), at 44 (S.D. Miss., July 11, 1975).

¹⁹⁷ See *Connor v. Coleman*, 96 S.Ct. 1814 (1976). One of these cases, *United Jewish Organizations, Inc. v. Wilson*, 377 F. Supp. 1164 (E.D.N.Y. 1974), *aff'd*, 510 F.2d 512 (2d Cir.), *cert. granted sub nom.*, *United Jewish Organizations, Inc. v. Carey*, 423 U.S. 945 (1975), is a review of New York's 1974 state legislative districting plan that was designed to create some districts with at least 65 percent nonwhite population. The Supreme Court's decision to grant certiorari in this case may indicate an intent to re-examine the federal courts' role in the reapportionment business. Letter from Giles W. Bryant, Special Assistant Attorney General, State of Mississippi, to D. Steve Gill, Jan. 15, 1976, on file with the *Mississippi Law Journal*.

¹⁹⁸ *Connor v. Coleman*, 96 S. Ct. 1814 (1976).

¹⁹⁹ *Connor v. Finch*, Civil No. 3830(A)(S.D. Miss., Aug. 24, 1976).

²⁰⁰ *Id.* at 23. See *Connor v. Finch*, Civil No. 3830(A) (S.D. Miss., Sept. 8, 1976) (supplemental decree ordering single-member districts for the House of Representatives).

²⁰¹ *Id.* at 7-8.

create the proper population balance among the newly formed districts, ceased its efforts to avoid fracturing county boundaries.²⁰²

Although the multi-member district question was answered conclusively, the amount of county boundary fracturing necessary to form a constitutionally acceptable plan may still be questioned by groups claiming dilution of voting strength.²⁰³ Under this plan, some individual polling places or supervisory beats were joined with another county to form a new district. The district court feared, however, that such fractionalization, if carried very far, would seriously disrupt the basic fabric of Mississippi government.²⁰⁴ Apparently concerned that the voter in the detached area may have little influence against the "majority bastion" in the other county,²⁰⁵ the court said:

We do not believe . . . that the Supreme Court intends that we should tear state policies to shreds. Both *Mahan* and *Chapman* abound with declarations to the contrary. What we propose to do is to set up single member districts, at the same time preserving as much as possible of the spirit of the rule against breaking counties apart.²⁰⁶

The task of formulating a reapportionment plan for the Mississippi Legislature has been an arduous and complicated undertaking for the 3-judge district court. The court has had to take Mississippi's counties, beats, and precincts as they actually are and not as what the court would have preferred. Also, the reapportionment of beats in many counties since the 1970 census²⁰⁷ required the court to recompute population figures relating to those counties. While the new plan represents an obvious compromise, stable and effective legislative government requires its acceptance.

II. REAPPORTIONMENT OF LOCAL GOVERNMENTAL UNITS

A. *Development of the One-Man, One-Vote Doctrine*

While the application of the one-man, one-vote principle to state legislative districting is relatively clear, uncertainty shrouds its application to governmental subdivisions of the states. The decisions in this area could have a greater impact because of the day-to-day contact between the citizenry and various units of local government.

²⁰² *Id.* at 6.

²⁰³ Interview with Giles W. Bryant, Special Assistant Attorney General for the State of Mississippi, Sept. 1, 1976.

²⁰⁴ *Connor v. Finch*, Civil No. 3830(A), at 6 (S.D. Miss., Aug. 24, 1976).

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 8.

²⁰⁷ See Table 2, note 282 *infra*.

The first of these decisions, *Sailors v. Board of Education*,²⁰⁸ involved the selection of local school board representatives in Michigan.²⁰⁹ The county school boards were elected by one voting delegate from each local school board regardless of the population of the local school district.²¹⁰ The Court held that there was no reason local officers of a non-legislative nature could not be appointed rather than elected.²¹¹ The principle of one-man, one-vote, therefore, was irrelevant.²¹² In the case of nonlegislative offices, a state can appoint local officials,²¹³ elect them, or combine the elective and appointive systems.²¹⁴

The Court decided *Dusch v. Davis*²¹⁵ on the same day *Sailors* was handed down. *Dusch* concerned the constitutionality of the composition of the city council in Virginia Beach, Virginia. In 1963, Virginia Beach and an adjoining county were consolidated under a borough form of government. Of the seven boroughs created, one corresponded to the boundaries of Virginia Beach and the remainder to the six county magisterial districts.²¹⁶ The population variance among the boroughs was significant. Specifically, two boroughs contained over one-half of the total county population.²¹⁷ Although all 11 members of the city council were elected at large, the candidates were required to satisfy a residency requirement.²¹⁸ This "Seven-Four Plan" permitted the four at-large council members to live within any borough, but required each of the remaining seven to live in separate boroughs.²¹⁹ In holding the plan constitutional,²²⁰ the Court noted that each of the 11 council members was elected by a vote of all city electors and that each represented the entire city, not just the borough in which he resided.²²¹ The Court found this system comparable to the one implemented in *Fortson v. Dorsey*,²²² where the constitutionality of a residency requirement for state senators

²⁰⁸ 387 U.S. 105 (1967).

²⁰⁹ *Id.* at 106.

²¹⁰ *Id.* at 106-07.

²¹¹ *Id.* at 108.

²¹² *Id.* at 111.

²¹³ *Id.* at 108.

²¹⁴ *Id.* at 111. See also *Robertson v. Gallion*, 282 F. Supp. 157 (M.D. Ala. 1968); *Goldblatt v. City of Dallas*, 279 F. Supp. 106 (N.D. Tex.) (three-judge court), *appeal dismissed*, 391 U.S. 360 (1968), *aff'd*, 414 F.2d 774 (5th Cir. 1969).

²¹⁵ 387 U.S. 112 (1967).

²¹⁶ *Id.* at 113.

²¹⁷ *Id.* at 117 n.5.

²¹⁸ *Id.* at 115.

²¹⁹ *Id.* at 114.

²²⁰ *Id.* at 117.

²²¹ *Id.* at 115.

²²² 379 U.S. 433 (1964). See also *Burns v. Richardson*, 384 U.S. 73 (1966). See text accompanying notes 158 & 164 *supra*.

ected from a multi-district county was upheld.²²³ Furthermore, assuming arguendo that the one-man, one-vote principle of *Reynolds* applied, the *Dusch* Court stressed that the equal protection test was whether implementation of the plan resulted in invidious discrimination.²²⁴ The Court believed that the "Seven-Four Plan" was not designed to avoid the consequences of reapportionment, but, rather, was intended to assure each borough representation on the council thus promoting understanding between rural and urban citizens.²²⁵

In neither *Sailor* nor *Dusch* did the Court reach the issue of whether the one-man, one-vote principle extended to local government units. In *Sailors*, the Court held the principle inapplicable because the unit involved was essentially administrative in nature and its members were appointed rather than elected.²²⁶ In *Dusch*, the Court held that even if the principle applied, the "Seven-Four Plan" did not constitute invidious discrimination.²²⁷ The extension of the one-man, one-vote principle to local government was thus postponed until the Court's decisions in *Avery v. Midland County*²²⁸ and *Hadley v. Junior College District*.²²⁹

The *Midland County* case dealt with a county commissioners' court. Composed of five persons, four of whom were elected by local districts of greatly varying size,²³⁰ the court constituted the general governing body of the county and performed various tasks such as establishing a courthouse and jail, appointing minor county officials, letting contracts for the building of roads and bridges, adopting the county budget, and setting the county tax rate.²³¹

A suit brought in state court by a resident of Midland, a city within the largest district, alleged that the population disparity among districts violated the fourteenth amendment.²³² While the Texas Supreme Court eventually found the scheme impermissible, it held that in light of other available considerations, substantial population equality among districts was unnecessary.²³³ The court also held redistricting to be within

²²³ 379 U.S. at 438.

²²⁴ 387 U.S. at 116; see *Reynolds v. Sims*, 377 U.S. 533, 561 (1964).

²²⁵ 387 U.S. at 116.

²²⁶ 387 U.S. 105, 108, 111 (1967). See also 21 VAND. L. REV. 153, 154 (1967).

²²⁷ 387 U.S. at 117. See generally Comment, *Constitutional Law—Reapportionment—Effect of One-Man, One-Vote Principle on Local Governments Below the State Legislative Level*, 19 S.C.L. REV. 839, 845-46 (1967).

²²⁸ 390 U.S. 474 (1968).

²²⁹ 397 U.S. 50 (1970).

²³⁰ 390 U.S. at 476.

²³¹ *Id.*

²³² *Id.* at 477.

²³³ *Avery v. Midland County*, 406 S.W.2d 422, 428-29 (Tex. 1966), *rev'g Avery v. Midland County*, 397 S.W.2d 919 (Tex. Civ. App. 1965).

the domain of the commissioners' court rather than the state courts.²³⁴

Vacating the judgment of the Texas Supreme Court,²³⁵ the United States Supreme Court emphasized that "[t]he Equal Protection Clause reaches the exercise of state power however manifested, whether exercised directly or through a subdivision of the State."²³⁶ The citizenry cannot be denied equal representation in political subdivisions possessing broad policy-making functions.²³⁷ In the Court's view, the commissioners' court performed some functions normally categorized as "legislative" and some typically characterized in other terms.²³⁸ Nevertheless, the county court was empowered to make a large number of decisions impacting upon citizens throughout the county.²³⁹ The Court thus concluded that local governmental units with general governmental powers over an entire geographic area could "not be apportioned among single-member districts of substantially unequal population."²⁴⁰

The *Midland County* decision, however, did not end the controversy over the application of the *Reynolds* principle to local government units. As a result of *Sailors*, *Dusch*, and *Midland County*, the courts were tasked with deciding which local government units possessed the requisite general governmental powers.

Hadley v. Junior College District,²⁴¹ an action brought by residents of the Metropolitan Kansas City Junior College District, involved a junior college district which had been formed by combining eight school districts in the Kansas City area.²⁴² Within the district, six trustees were elected to represent the separate school districts. Representation was apportioned according to the number of residents in each district between the ages of 6 and 20.²⁴³ Though containing 60 percent of the enumeration, the Kansas City School District, a subdivision of the Metropolitan Kansas City Junior College District, elected only 50 percent of the trustees.²⁴⁴ The residents claimed that their right to vote for trustees of the district was being diluted in violation of the equal protection clause.²⁴⁵ The Supreme Court found that although the powers of the

²³⁴ 406 S.W.2d at 428.

²³⁵ *Avery v. Midland County*, 390 U.S. 474 (1968).

²³⁶ *Id.* at 479.

²³⁷ *See id.* at 479-81.

²³⁸ *Id.* at 482.

²³⁹ *Id.* at 482-83.

²⁴⁰ *Id.* at 484-86. Mr. Justice Fortas argued that the Court had adopted "an absolute and inflexible formula" which represented a "rigid, theoretical, authoritarian approach to the problems of local government". *Id.* at 496-97 (Fortas, J., dissenting).

²⁴¹ 397 U.S. 50 (1970).

²⁴² *Id.* at 51.

²⁴³ *Id.*

²⁴⁴ *Id.* at 51-52.

²⁴⁵ *Id.* at 52.

junior college district were not as broad as those in *Midland County*, they were general enough and had sufficient impact throughout the district to justify application of the one-man, one-vote principle.²⁴⁶ The Court therefore refused to accept the apportionment plan because it automatically discriminated against the more populous districts.²⁴⁷

The language in *Hadley* seemingly indicates that, although there may be exceptions, elections of state and local governmental officials must comply with the one-man, one-vote rule:

We therefore hold today that as a general rule, whenever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election, and when members of an elected body are chosen from separate districts, each district must be established on a basis which will insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials. It is of course possible that there might be some case in which a State elects certain functionaries whose duties are so far removed from normal governmental activities and so disproportionately effect different groups that a popular election in compliance with *Reynolds* . . . might not be required. . . .²⁴⁸

While the *Hadley* decision can be interpreted narrowly to mean that the one-man, one-vote principle applies to the election of junior college trustees, its implications are more far-reaching. In its practical effect, *Hadley* extended *Midland County's* holding—that a disparity in population among districts violates the equal protection clause—not only to school districts but also to all other elected bodies.²⁴⁹

In 1973, however, the Supreme Court recognized an exception to the *Hadley* decision. *Salyer Land Co. v. Tulare Water District*²⁵⁰ involved a special purpose district established under California law to acquire, store, and distribute water for the purpose of irrigation. As a matter of statute, only landowners were eligible to vote for the water district's board of directors, and each was accorded one vote per \$100 in assessed

²⁴⁶ *Id.* at 53-54. *But cf.* *Oaks v. Board of Trustees*, 385 F. Supp. 392 (N.D. Miss. 1974) (one-man, one-vote not applicable to selection of Mississippi junior college trustees who are appointed rather than elected); *Community College v. School Dist.*, 4 Pa. Cmwh. 483, 287 A.2d 844 (1972) (when state chooses to select members of community college's board of trustees by appointment rather than election, fact that each trustee does not represent the same number of people is not violative of equal protection clause).

²⁴⁷ 397 U.S. at 58.

²⁴⁸ *Id.* at 56.

²⁴⁹ *Gardner, Fuller v. Dunne: The Limits of Local Reapportionment*, 50 CHI.-KENT L. REV. 446, 449 (1973).

²⁵⁰ 410 U.S. 719 (1973).

land valuation.²⁵¹ Funds for the district's operation were provided by assessing landowners based upon the value of their property.²⁵² Plaintiffs claimed, *inter alia*, that because the district's operations had an important and significant impact on all residents, the weighted voting system was unconstitutional. The Court, however, held that statutes authorizing disproportionate representation on the governing bodies of special purpose districts which did not perform general public services and whose activities had a disproportionate effect on a recognizable and definable group were constitutional.²⁵³ Thus, if a legislature has a rational basis for a particular voting provision, it will be upheld if elections to which it applies involve activities far removed from normal government activities and which disproportionately affect different groups. In *Salyer*, the Court found that the issue involved landowners as a definable group, whose interests increased in proportion to the amount of land owned.²⁵⁴ The *Salyer* decision represents the Court's seminal identification of a local government unit, creating an exception to *Hadley*. The Court thus supported innovation in local government, but found that if significant interests could be affected, and if those interests were without representation, the equal protection clause would apply.²⁵⁵

In *Abate v. Mundt*,²⁵⁶ the Supreme Court indicated the degree of permissible flexibility in drawing district boundaries for local government units. Although the plan challenged in *Abate* deviated from the ideal population variance by 11.9 percent,²⁵⁷ the Court reasoned that since local governments need flexibility to meet society's changing needs, a desire to follow political subdivision lines might be justified.²⁵⁸ The Court held that the need for local intergovernmental coordination was necessary and thus was supported by an acceptable state policy. In the absence of indigenous bias, "particular circumstances and needs of a local community as a whole may sometimes justify departures from strict equality."²⁵⁹ *Abate's* expansion of *Dusch's* flexibility notion signalled the Court's tolerance of experimentation and innovation in local

²⁵¹ *Id.* at 724-25 n.6.

²⁵² *Id.* at 724.

²⁵³ *Id.* at 728. *But see* *Cipriano v. City of Houma*, 395 U.S. 701 (1969), *rev'g and remanding* 286 F. Supp. 823 (E.D. La. 1968); *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969), *rev'g and remanding* 282 F. Supp. 70 (E.D.N.Y. 1968); *Pierce v. Village of Ossining*, 292 F. Supp. 113 (S.D.N.Y. 1968).

²⁵⁴ 410 U.S. at 728.

²⁵⁵ Martin, *The Supreme Court and Local Reapportionment: Voter Inequality in Special-Purpose Units*, 15 WM. & MARY L. REV. 601, 614 (1974).

²⁵⁶ 403 U.S. 182 (1971).

²⁵⁷ *Id.* at 184.

²⁵⁸ *Id.* at 185.

²⁵⁹ *Id.*

governmental activities and the development of a less stringent standard for apportionment for local governments by balancing the one-man, one-vote requirement against factors such as the traditionally close cooperation of county government and constituent towns.²⁶⁰ *Abate* thus provides a rationale for preserving existing political subdivisions in local governments despite existing variances in voting equality²⁶¹ and, when read with *Salyer*, arguably indicates a retreat from the principle of voter equality in local government.

B. Reapportionment on the Local Level in Mississippi

When the United States Supreme Court decided *Midland County*, the federal courts had already applied the one-man, one-vote rule to Mississippi's board of supervisor districts.²⁶² The county governing board in *Midland County* is functionally equivalent to Mississippi's board of supervisors.²⁶³ Mississippi's statute²⁶⁴ requires that supervisor districts be divided and drawn "with due regard to equality of population," but the statute does not mandate that malapportioned districts be changed. The resulting infrequent use of the statutory procedure for redistricting a county's supervisor districts has served as the major impetus for redistricting in federal district court litigation.²⁶⁵

The 1966 amendment to section 19-3-1—to permit boards of supervisors to adopt at-large elections of board members—²⁶⁶ prompted sev-

²⁶⁰ This factor had previously been specifically rejected for congressional redistricting in *Kirkpatrick v. Preisler*, 294 U.S. 526 (1969). See note 52 *supra*.

²⁶¹ 403 U.S. 182, 187 (1971)(Brennan, J., dissenting).

²⁶² See *Martinolich v. Dean*, 256 F. Supp. 612 (S.D. Miss. 1966)(board of supervisors is the effective governing body of a county—1960 census showed that Hancock County's fifth supervisory district contained 63 percent of the county's population); *Damon v. Lauderdale County Bd. of Supervisors*, 254 F. Supp. 918 (S.D. Miss. 1966)(Lauderdale County).

²⁶³ Compare TEX. CONST. art. V, § 18, with MISS. CONST. art. 6, § 170 (creation and jurisdiction of county boards of supervisors).

²⁶⁴ MISS. CODE ANN. § 19-3-1 (1972).

²⁶⁵ *Martinolich v. Dean*, 256 F. Supp. 612 (S.D. Miss. 1966); *Damon v. Lauderdale County Bd. of Supervisors*, 254 F. Supp. 918 (S.D. Miss. 1966). But see *Glass v. Hancock County Election Comm'n*, 250 Miss. 40, 156 So.2d 825 (1963), *appeal dismissed and cert. denied*, 378 U.S. 558 (1964)(section 19-3-1 affords an adequate remedy at law precluding the issuance of an injunction against holding an election of supervisors until the county shall be redistricted). For a discussion of this case see McKay, *Reapportionment and Local Government*, 36 GEO. WASH. L. REV. 713, 719-20 (1968).

²⁶⁶ Act of May 27, 1966, ch. 290, § 1, [1966] Gen. Laws Miss., *codified in* MISS. CODE ANN. § 19-3-1 (1972), provided that:

[T]he board of supervisors of any county may adopt an order providing that all the qualified electors of the county shall be eligible to vote for each member of the board of supervisors but each candidate shall be a resident of the district which he proposes to represent.

eral Mississippi counties to opt for at-large elections in an attempt to cure their malapportioned districts.²⁶⁷ In *Allen v. State Board of Election*,²⁶⁸ however, the Supreme Court ruled that the new law could not take effect until Mississippi obtained federal preclearance under Section 5 of the Voting Rights Act.²⁶⁹ Consequently, Washington County's subsequent attempt to implement at-large elections under the new amendment failed because the board of supervisors lacked authority to impose such a plan in the county.²⁷⁰ Moreover, because at-large elections frequently have the effect of diluting the voting strength of black majority districts,²⁷¹ federal courts in Mississippi subsequently have enjoined attempted structural changes.²⁷²

The virtual impossibility of a county converting to at-large elections has caused most Mississippi counties to remedy the malapportionment in their county by redrawing district lines. Many of these attempts have been attacked as a resort to gerrymandering of supervisory districts in an effort to dilute black voting strength.²⁷³ The board of supervisors in each county is empowered to employ professional planners to develop a redistricting system.²⁷⁴ Such planners often use criteria not directly related to population²⁷⁵ and this fact has led to further charges of racial gerrymandering in the drawing of district lines.²⁷⁶ Considering Mississippi's unfortunate history of race relations,²⁷⁷ these charges may well have been justified. Also involved, however, are the usual political considerations. The drawing of district lines and constituency formation in a county involves the struggle of different interest groups for power and, in numerous ways, affects legitimate county interests in ensuring that

²⁶⁷ At-large elections may meet *Reynolds'* one-man, one-vote test "that the vote of any citizen is approximately equal in weight to that of any other citizen" *Reynolds v. Sims*, 377 U.S. 577, 579 (1964). See note 272 *infra*.

²⁶⁸ 393 U.S. 544 (1969).

²⁶⁹ *Id.* at 564-72; see text accompanying note 120 *supra*.

²⁷⁰ *Dyer v. Love*, 307 F. Supp. 974 (N.D. Miss. 1969). See also *State ex rel. Patterson v. Board of Supervisors*, 239 Miss. 671, 125 So. 2d 91 (1960) (supervisor's powers governed entirely by statute).

²⁷¹ See note 157 and accompanying text *supra*.

²⁷² See note 270 and accompanying text *supra*. But see *Sheffield v. Itawamba County Bd. of Supervisors*, 439 F.2d 35, 37 (5th Cir. 1971) (dictum) (at-large elections permissible as an alternative to malapportioned districts where such change has no racial effect).

²⁷³ See generally *Parker, County Redistricting in Mississippi: Case Studies in Racial Gerrymandering*, 44 Miss. L.J. 391, 402-08 (1973).

²⁷⁴ See Miss. CODE ANN. § 19-3-1 (1972).

²⁷⁵ See *Bassett v. Roberts*, Civil No. J74-135(N) (S.D. Miss., June 13, 1975). In *Bassett*, the district court accepted the redistricting plan of Smith County as meeting all constitutional standards.

²⁷⁶ See *Parker*, *supra* note 273, at 407-08.

²⁷⁷ See generally *THE CHANGING POLITICS IN THE SOUTH* 472-524 (W. Harvard ed. 1972).

each supervisor has his fair share of duties and responsibilities.²⁷⁸ Judicial acceptance of the legitimate county interests is necessary if the boards of supervisors are to be able to effectively carry out their responsibilities.

"As Rome was not built in a day, so has it required much time to reapportion the counties in Mississippi into five supervisors districts of substantially equal population"²⁷⁹ While most Mississippi counties remained severely malapportioned in 1970,²⁸⁰ several have undergone subsequent redistricting to meet the requirements of the one-man, one-vote rule.²⁸¹

²⁷⁸ See note 275 *supra*. See also *Howard v. Adams County Bd. of Supervisors*, 453 F.2d 455 (5th Cir. 1972), *cert. denied*, 407 U.S. 925 (1972).

²⁷⁹ *Connor v. Waller*, Civil No. 3830, at 19 (S.D. Miss., July 8, 1975).

²⁸⁰ *Id.* at Appendix.

²⁸¹ TABLE 2—*Revisions of Supervisors' Districts in Mississippi* (as of January 1, 1976).

County	Date of Last Redistricting
Adams*	1972
Benton	1970
Calhoun	1968
Chickasaw	1968
Coahoma	1971
Covington	1973
Forrest	1975
Grenada	1870
(Revision Anticipated)	1970
Hancock	1970
Harrison**	1975
Hinds***	1975
Holmes	1969
Issaquena	1972
Itawamba****	1971
Jackson	1972
Jefferson Davis	1968
Jones	1970
Kemper	1970
Lauderdale	1974
Lawrence	1968
Leake	1971
Leflore*****	1974
Lincoln	1970
Marion	1970
Marshall	1970
Monroe	1970
Montgomery	1970

County officials in every Mississippi county should take steps to see that their supervisory districts are regularly reapportioned to meet constitutional requirements. The responsibility and duty to draw geographical divisions within a county lies with the board of supervisors, just as the drawing of legislative districts is a vital function of the state legislature. The courts should not have to be compelled to do the job.

III. CONCLUSION

In Mississippi, the federal courts have been compelled far too many times to assume the vital legislative function of curing malapportioned districts. With the theory of one-man, one-vote becoming more familiar and popular with Mississippians, county and state legislative officials will have no excuse for not regularly reapportioning their districts in accordance with basic constitutional principles.

The Supreme Court's use of multiple constitutional standards in reapportionment cases, however, has caused a substantial amount of confusion. The Court has moved from a strict standard of mathematical exactitude in all reapportionment cases to a standard that allows greater

Noxubee	1975
Pearl River	1970
Pontotoc*****	1959
(Revision Anticipated)	(1976)
Rankin	1970
Scott	1970
Smith*****	1975
Union	1970
Warren*****	—
(Revision Anticipated)	(1976)
Wayne	1968
Wilkinson	1970

SOURCE: Letter from Robert A. DeVille, Associate Research Analyst, Mississippi Research and Dev. Center, Jackson, Mississippi, to D. Steve Gill, Jan. 8, 1976, on file with the *Mississippi Law Journal*.

* *Howard v. Adams County Bd. of Supervisors*, 453 F.2d 455 (5th Cir. 1972), *cert. denied*, 407 U.S. 925 (1972).

** *Reed v. Quave*, Civil No. 3146 (S.D. Miss. 1975).

*** *Kirksey v. Board of Supervisors*, 402 F.Supp. 658 (S.D. Miss. 1975).

**** *Sheffield v. Itawamba County Bd. of Supervisors*, 439 F.2d 35 (5th Cir. 1971).

***** *Moore v. Leflore County Bd. of Election Comm'rs*, 361 F. Supp. 609 (N.D. Miss. 1973).

***** *Bass v. Baker*, Civil No. WC-75-1025 (N.D. Miss., Nov. 19, 1975).

***** *Bassett v. Roberts*, Civil No. J74-135(N) (S.D. Miss., June 13, 1975).

***** *United States v. Board of Supervisors*, Civil No. 73W-48(N)(S.D. Miss., July 1, 1975).

variation of population equality depending on the type of governmental unit involved.

By 1971, with the addition of the Nixon appointees, the era of the Warren Court had ended. The Warren Court's "broadly-conceived egalitarianism"²⁸² was clearly evident in those decisions decreeing equal apportionment on a one-man, one-vote basis. This "Court found the essence of political democracy in the power of a majority to impose its wishes through an election."²⁸³ The Warren Court's one-man, one-vote rule, however, has been confronted with issues far more complex than those presented in the early apportionment cases, and these difficult issues have strained the viability of the rule. Although some have speculated that this popular enterprise of reapportionment is "heading toward obsolescence," the future may yet belong to this far-sighted Court.²⁸⁴

The changes mentioned above concerning proper constitutional standards in reapportionment cases began in 1971. The Nixon appointees appear to have had a profound influence in halting further extension of the one-man, one-vote principle. In fact, the Court's present apportionment majority, faced with the possibility of having to consider every future situation in which there is a numerical variance, has signaled a desire to return some of the burden to state legislatures.

That the Court was not deterred by the hazards of the political thicket when it undertook to adjudicate the reapportionment cases does not mean that it should become bogged down in a vast, intractable apportionment slough, particularly when there is little, if anything, to be accomplished by doing so. . . . Involvements like this must end at some point ²⁸⁵

The Court has retained a popularity that is not markedly different than it was before it entered Frankfurter's "political thicket." Moreover, the principle of one-man, one-vote has become deeply ingrained within the public's consciousness. Despite the present Court's cautious tone, this trend is not to be reversed.

²⁸² A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 103 (1970).

²⁸³ *Id.* at 108-09.

²⁸⁴ *Id.* at 173.

²⁸⁵ *Gaffney v. Cummings*, 412 U.S. 735, 749-50 (1973).

Mississippi Law Journal

JOURNAL of the MISSISSIPPI STATE BAR and
the UNIVERSITY of MISSISSIPPI SCHOOL OF LAW

VOLUME 47

NOVEMBER 1976

NUMBER 5

EDITORIAL BOARD

Editor-in-Chief

HERBERT C. EHRHARDT

Assistant Editor

WILLIAM N. REED

Article Editors

DAN W. WEBB

ZACHARY TAYLOR III

Research Editors

FRANK J. HAMMOND III

CHARLES CLARK HARRELL

MICHAEL LEE KNAPP

Index and Review Editor

MICHAEL EUGENE EARWOOD

Comment Editors

RICHARD DEVON GAMBLIN

DALTON McBEE, JR.

Note Editors

BETTY ANN MORGAN

JEFFREY A. WALKER

Business Manager

T. FRANKLIN MYERS, JR.

Associate Editors

ROBERT DEMENT DRINKWATER

CHARLES DAVID SWENSON

Faculty Advisor

E. CLIFTON HODGE, JR.

STAFF

S. ALLAN ALEXANDER

WAYNE C. ARNOLD

WILLIAM F. BLAIR

CHARLES GLEN BUSH

RICHARD G. COWART

T. DAVID COWART

MARK JAMES CHANEY, JR.

FRANK J. DANTONE

TOMMY E. FURBY

NANCY HARRELSON

DANIEL HURD HUDSON

DAVID P. JAQUA

VICTORIA JEAN JOHNSON

JAMES LAWRENCE JONES

ROBERT DAVID KAUFMAN

FRED KRUTZ III

MICHAEL TALMADGE LEWIS

JANE RIALS McWILLIAMS

ROBERT ABIDE MALOUF

H. DIXON MONTAGUE

ALICE FAYE MURPHREE

REBECCA GORDON ORF

ALLIE STUART POVALL, JR.

RICHARD FURLOW SCRUGGS

GREGG LINDSEY SPYRIDON

PAUL HOUSTON STEPHENSON III

J. KENNEDY TURNER III

H. M. YOSTE, JR.

COMMENTS

GOING PRIVATE AND RULE 10b-5: THE *Green* AND *Marshall* DECISIONS

[T]he laws governing the securities market become more intricate and finely spun daily. Some engaged in the business of securities trading believe themselves to be characters from Victorian novels wandering aimlessly on treacherous moors.¹

As part of the reaction to the stock market debacle of 1929 and the ensuing economic depression, Congress passed the Securities Exchange Act of 1934.² Although the Act was designed to regulate many aspects of secondary securities distribution,³ the most judicially fecund section deals with the prohibition of fraud and manipulative practices in connection with the purchase or sale of securities.⁴ It was under this section that the Securities and Exchange Commission (SEC) promulgated Rule 10b-5.⁵ Precipitating a plethora of litigation,⁶ Rule 10b-5 has

¹ *H. Kook & Co., Inc. v. Scheinman, Hochstin & Trotta, Inc.*, 414 F.2d 93, 98 (2d Cir. 1969).

² 15 U.S.C. §§ 78a to hh-1 (1970). See *Hearings on H.R. 8120 and H.R. 7852 Before the House Comm. on Interstate Commerce and Foreign Commerce*, 73d Cong., 2d Sess. 7 (1934).

³ See, e.g., 15 U.S.C. § 78e (1970) (registration of securities); *id.* § 78n (proxy regulation); *id.* § 78o-3 (registration of national securities associations).

⁴ 15 U.S.C. § 78j(b) (1970). This section provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

...

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Id. (emphasis added).

⁵ 17 C.F.R. § 240.10b-5 (1976). The rule provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates

produced a continually evolving and expanding body of federal law regulating corporate transactions which involve the purchase or sale of securities. More a product of its evolutionary nature than of design, this body of law has been primarily characterized by incessantly varying interpretations of Rule 10b-5.⁷ This comment focuses on the impact of two recent Second Circuit pronouncements regarding the allegations necessary to constitute a federal cause of action under Rule 10b-5 in addition to, or, as some may say, in derogation of, state law governing corporate management. Since these two decisions are products of attempts by corporate management to go private through merger transactions, the "going private" concept will be evaluated. Furthermore, in order to illuminate the significance of these decisions, prior judicial attitudes toward corporate mismanagement and Rule 10b-5 will be summarized.

or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

The rule, published in SEC Securities Exchange Act Release No. 3230 (May 21, 1942), had an impromptu birth. It was a reaction to a scheme by the president of a Boston corporation who, having misrepresented the economic condition of the corporation to its stockholders, was buying up the stock at depressed prices. See *Conference on Codification of the Federal Securities Laws*, 22 BUS. LAW. 793, 922 (1967). Subsection (b), which alone would have dealt with this problem, is directly concerned with nondisclosure and misrepresentation. Since the decisions which are the subject of this comment depict instances of full disclosure and accurate representation, subsection (b) is largely irrelevant to this discussion, except as it may import negative implications against assertions that subsections (a) and (c) should be strictly construed.

⁶ See, e.g., 1 A. BROMBERG, *SECURITIES LAW: FRAUD, SEC RULE 10b-5* (Supp. 1972-73).

⁷ See *H. Kook & Co., Inc. v. Scheinman, Hochstin & Trotta, Inc.*, 414 F.2d 93, 98 (2d Cir. 1969). Of notable interest are the words of Judge Medina criticizing the majority opinion in *Schoenbaum v. Firstbrook*, 405 F.2d 215 (2d Cir. 1968) (en banc), cert. denied, 395 U.S. 906 (1969):

What this amounts to is giving *carte blanche* to every holder of a few shares in any corporation whose stock is traded on the New York or American stock exchanges to give his imagination full reign in the making of any sort of extravagant charges, no matter how ill founded in fact they may be . . . This, while doubtless not so intended, is in my judgment nothing short of a standing invitation to blackmail or extortion . . . And all this under the aegis of Rule 10b-5! 405 F.2d at 222.

This statement emphasizes the vagaries of "the law" under 10b-5 when it is remembered that Judge Medina also authored the majority opinion in *Green v. Santa Fe Indus., Inc.*, 533 F.2d 1283 (2d Cir. 1976), one of the cases with which this comment deals. In *Green*, Judge Medina, recognizing that *Schoenbaum* reaffirms the basic principles that directors and controlling shareholders are fiduciaries, adopted the language of the United States Supreme Court in stating:

Their dealings with the corporation are subject to rigorous scrutiny and where any of their contracts or engagements with the corporation is [sic] challenged the burden is on the director or stockholder not only to prove the good faith of the transaction but also to show its inherent fairness from the viewpoint of the corporation and those interested therein.

533 F.2d at 1290, quoting *Pepper v. Litton*, 308 U.S. 295, 306 (1939).

I. THE CONTEXT: "GOING PRIVATE"

A. *The Concept*

Both *Green v. Santa Fe Industries, Inc.*⁸ and *Marshel v. AFW Fabric Corp.*⁹ arose in the context of attempts to go private through merger transactions, a largely recent phenomenon in the securities world.¹⁰ Thus, an understanding of going private transactions is a prerequisite to an analysis of these decisions.

"Going private" may be described generally as the reduction or elimination of publicly held minority shares. This a fortiori increases the percentage of control enjoyed by corporate insiders¹¹ and, thus, not only involves the "freezing-out" of minority interests but also produces simultaneous benefits for minority interests.¹² Consequently, concern in this area is properly focused on the propriety of the issuer's reacquisition of its own shares at depressed prices in an attempt to accomplish a freeze-out.¹³

Since going public was a by-product of burgeoning participation in the public securities market during the 1960's, going private became a popular alternative to continued participation in that market during the recessionary period of the early 1970's.¹⁴ Despite its popularity, going

⁸ 533 F.2d 1283, *petition for rehearing en banc denied*, 533 F.2d 1309 (2d Cir. 1976).

⁹ 533 F.2d 1277, *petition for rehearing en banc denied*, 533 F.2d 1309 (2d Cir. 1976).

¹⁰ E.g., Soloman, *Going Private: Business Practices, Legal Mechanics, Judicial Standards and Proposals for Reform*, 25 BUFF. L. REV. 141 (1975); Swanson, *The Elimination of Public Shareholders: Going Private*, 7 CONN. L. REV. 609, 610-13 (1975).

¹¹ See, e.g., *Bryan v. Brock & Blevins Co.*, 490 F.2d 563 (5th Cir.), *cert. denied*, 419 U.S. 844 (1974); *Kaufman v. Lawrence*, 386 F. Supp. 12 (S.D.N.Y. 1974); *Teschner v. Chicago Title & Trust Co.*, 59 Ill. 2d 452, 322 N.E.2d 54, *appeal dismissed*, 422 U.S. 1002 (1975). See also Note, *Going Private*, 84 YALE L.J. 903, 909-22 (1975).

For purposes of this comment, the word "insiders" is used in reference to corporate management and controlling shareholders. See H. HENN, *THE LAW OF CORPORATIONS* § 231, at 450 (2d ed. 1970) [hereinafter cited as HENN].

¹² Note, *supra* note 11, at 919.

[T]he ultimate beneficiaries of going private are the insiders, i.e., the controlling shareholders. They benefit directly from any increase in the company's value that results from going private. They also acquire an immediate profit from the net difference between the original public offering price and the repurchase price at the time of the going private transaction.

Note, *Going Private: An Analysis of Federal and State Remedies*, 44 FORDHAM L. REV. 796, 798 (1976).

A freeze-out occurs when the majority shareholders use their power either to eliminate the minority's equity interest, to emasculate their voting strength, or to deprive them in any way of the rights normally associated with stock ownership. 2 F. O'NEAL, *CLOSE CORPORATIONS* § 807, at 43 (2d ed. 1971).

¹³ Brudney, *A Note on "Going Private"*, 61 VA. L. REV. 1019 (1975).

¹⁴ Swanson, *supra* note 10, at 610; Comment, *Corporate Freeze-Outs Effected by Merger: The Search for a Rule*, 27 U. PITT. L. REV. 115 (1975).

private has not been well received by most commentators.¹⁵ There are, however, several arguments justifying the practice. Four of these arguments, which essentially are specific assertions of a valid corporate purpose, are especially prevalent in the literature.

First, some corporate insiders contend that the elimination of minority interests can be justified whenever the market price for the corporation's stock is depressed. Insiders argue that deflated prices preclude the stock from effectively serving the purposes for which it was originally offered. For example, stock with a depressed market value facing a limited demand is not only ill-suited for raising further equity but also does not function well as a means for acquisitions or for increasing management incentives through stock options.¹⁶ On the surface, then, the existence of depressed stock prices appears to provide substantial support for the assertion that a challenged going private transaction should be upheld. Yet, this argument merely skirts the frontier of reality. While depressed market values may provide the occasion, going private is most likely the result of increasing insider dissatisfaction with an originally ill-founded decision to "go public."¹⁷ Additionally, this argument fails to answer the obvious counter-allegation that the minority which is frozen-out will no longer be in a position to receive the benefits which would accrue to them at a later time when the securities market is on the upswing.¹⁸

Second, going private, which relieves the corporation from SEC registration¹⁹ and disclosure requirements,²⁰ is justified as a means of

¹⁵ Such commentators are notably bothered by the resulting inequities of going private. See, e.g., Brudney, *supra* note 13; Soloman, *supra* note 10; Swanson, *supra* note 10; Comment, "Going Private": Establishing Federal Standards for the Forced Elimination of Public Investors, 1975 U. ILL. L.F. 638.

¹⁶ See Soloman, *supra* note 10, at 143-45.

¹⁷ Borden, *Going Private—Old Tort, New Tort, No Tort?*, 49 N.Y.U.L. REV. 987, 1006-07 (1974).

¹⁸ Such a position does not countenance the view that the minority should never be eliminated because there may be future profits which are missed. It does, however, subsume an underlying theme of this comment—that the valid corporate purpose test is the one upon which the validity of any going private transaction should hinge. Assuming there is a balancing of the minority's desire to retain its investment against the insider majority's clamorings for the widest possible flexibility in corporate management, a test based on the existence of a valid corporate purpose provides the most realistic compromise. See generally Brudney, *supra* note 13; Vorenberg, *Exclusiveness of the Dissenting Stockholder's Appraisal Right*, 77 HARV. L. REV. 1189 (1964); Comment, *supra* note 14.

¹⁹ E.g., 15 U.S.C. § 781(g)(4) (1970) (Issuer may terminate registration with the Securities and Exchange Commission (SEC) after the number of record holders of registered equity securities falls below 300.).

²⁰ See, e.g., 15 U.S.C. §§ 78m(a), o(d) (1970) (require periodic reports to the SEC). Since termination of SEC registration also means that the disclosure provisions no longer have to be complied with, substantial costs are saved. Recent estimates indicate that the

reducing costs. It is readily apparent that deregistration could often provide significant savings to the small or medium sized corporation.²¹ The accuracy of this assertion, however, is a function of the verity of the net income statement, the counterbalancing tax consequences to the surviving close entity, and the cost involved in the repurchase of the shares.²² Therefore, such a facile expression should properly serve only as the point from which closer scrutiny of a particular "going private" transaction is begun.²³

The third most common supportive argument for going private is uneasiness regarding continued exposure of corporate activities to public view.²⁴ This reasoning, however, underlies a fourth ground for going private—the corporate insiders' expressed desire for greater managerial flexibility.²⁵ It has been argued, for example, that the inherent conflict between public shareholders and insiders is the major motivation for going private.²⁶

Though management flexibility is surely an attractive objective, does it justify the forced elimination of minority interests from equity participation? The flexibility argument may well be a subterfuge for the insider's desire to eliminate outside interests²⁷ and thereafter reap the increased benefits accruing to the remaining shareholders.²⁸ The man-

average cost saving may be between \$75,000 and \$200,000 per year. Compare Borden, *supra* note 17, at 1007, with Swanson, *supra* note 10, at 614-15.

²¹ Despite its arguable cost-saving advantages, the elimination of the expenses incurred because of SEC registration is not alone likely to constitute a valid corporate purpose for a going private transaction. Cf. Berkowitz v. Power/Mate Corp., 135 N.J. Super. 36, 342 A.2d 566, 571 n.4 (Ch. 1975).

²² Swanson, *supra* note 10, at 615-16. Mr. Swanson also suggests that [a] less obvious cost is borne by [any] remaining public shareholders who lose the protections afforded them by §§ 13, 14, and 16 of the Exchange Act as well as the availability of a public market for their shares.

Id. at 616 (footnotes omitted). Moreover, the cost justification analysis of deregistration loses strength when the plan calls for complete elimination of publicly held equity interests, instead of eliminating only that number of shareholders as would be adequate to avoid registration. See *id.* at 617-18.

²³ As such it would serve to provide an additional factor to consider when determining the existence vel non of a valid corporate purpose for the transaction.

²⁴ Schneider & Manko, *Going Public—Practice, Procedure, and Consequences*, 15 VILL. L. REV. 283, 284-85 (1970).

²⁵ Soloman, *supra* note 10, at 146.

²⁶ See Borden, *supra* note 17, at 1006-07.

²⁷ See Note, *supra* note 11, at 906-09. The author recommends what amounts to a sliding scale between a required showing of a compelling corporate need and mitigating lower degrees of coercion. *Id.* at 924.

²⁸ Corporate executives are, of course, not oblivious to the fact that benefits also accrue to insiders. As the remaining shareholders they may, in effect, be buying assets at below book value and often at a fraction of the price at which the shares were sold to the public. Insiders may increase or reestablish complete ownership

agement flexibility argument is, therefore, weak because its response to the challenge of inequity sounds of ad hoc rationalization.

While the foregoing may not dictate an absolute prohibition of all "going private" transactions, it at least urges the need for a broad perspective in analyzing these cases. A broad perspective, by facilitating the balancing of competing interests, will enhance the likelihood of achieving the best accommodation when conflicts arise.²⁹ Moreover, although there are several ways in which going private can be accomplished,³⁰ the need for such balancing is particularly great when the transaction is accomplished by means of a merger.³¹

B. Accomplishment by Merger

There are two kinds of mergers which may be used to effect a freeze-

without cash outlay on their part. The fear of a take-over by a third party is removed, as is the danger of scrutiny of insiders' conduct by courts and the [SEC]. The possibility also exists for a future reoffering of the shares to the public in a rising market at an increased price-earnings multiple.

Soloman, *supra* note 10, at 146-48; *cf.* Borden, *supra* note 17, at 1013.

²⁹ See Brudney, *supra* note 13, at 1050-55. "[O]nly a showing of off-setting need or social gain can justify . . . 'going private' . . . for the benefit of corporate insiders." *Id.* at 1055 (footnotes omitted).

³⁰ There are five methods which may be employed to accomplish going private: (1) an asset sale; (2) a dissolution proceeding; (3) a tender offer; (4) a reverse stock split; and (5) a merger transaction. In both the asset sale and dissolution methods, insiders use their wholly owned or controlled shell corporation to purchase the assets of the public entity. A tender offer is often the first step in a two-step transaction where recalcitrant shareholders' stock is acquired through the use of one of two mop-up techniques—a reverse stock split or a merger. A reverse stock split involves the statutorily condoned cash repurchase of fractional minority shares. A merger is used by insiders transferring their shares in the target public entity to a shell corporation under their control. Then, following the consummation of a merger between the insider's corporation with the target public entity, minority shareholders are forced to accept either the merger-dictated price for their stock or attempt to utilize their statutory right to appraisal. In addition to being used as "mop-up" techniques in a two-step freeze-out, both reverse stock splits and mergers can be used even though there has been no prior tender offer. Note, *supra* note 12, at 798-99; *see, e.g.,* Lebold v. Inland Steel Co., 125 F.2d 369 (7th Cir. 1941), *cert. denied*, 316 U.S. 675 (1942)(assets sold to a shell corporation controlled by insiders); Grimes v. Donaldson, Lufkin & Jenrette, Inc., 392 F. Supp. 1393 (N.D.Fla. 1974), *aff'd*, 521 F.2d 812 (5th Cir. 1975)(tender offer followed by merger of publicly held corporation into a subsidiary of the target corporation's principal stockholder); Kaufman v. Lawrence, 386 F. Supp. 12, 13-15 (S.D.N.Y. 1974)(tender offer for purchase of all outstanding shares); Teschner v. Chicago Title & Trust Co., 59 Ill. 2d 452, 322 N.E.2d 54 (1974), *appeal dismissed*, 422 U.S. 1002 (1975)("mop-up" by reverse stock split). *See generally* Borden, *supra* note 17; Brudney, *supra* note 13.

³¹ See Brudney, *supra* note 13, at 1021-30. Both *Green v. Santa Fe Indus., Inc.*, 533 F.2d 1283 (2d Cir. 1976), and *Marshall v. AFW Fabric Corp.*, 533 F.2d 1277 (2d Cir. 1976), arose in the context of challenges to going private merger transactions.

out of minority interests.³² First, in a short-form merger, if a parent corporation owns a specified percentage, typically 90 percent,³³ of the outstanding shares in another corporation, most likely a shell corporation established as part of the freeze-out, it can merge this subsidiary into itself merely upon the approval of its board of directors.³⁴ If the insiders lack the control necessary to accomplish a short-form merger, the option of a long-form merger may be still available. Using this latter means, if the insiders possess the statutory percentage of control in the public corporation, typically two-thirds,³⁵ they can, by shareholder vote, merge with a private corporation already under 100 percent control of the insiders, ridding the corporation of the public shareholders in the process. Even though the approval of the shareholders of the public corporation is a part of the long-form merger transaction, it is no less coercive than the short-form merger—the essential distinction between the two is the difference in the percentage of control which the insiders must have in order to effectuate them.³⁶ Thus, although the means used to accomplish the elimination of outstanding publicly held minority interests may vary, the results are generally the same and the same analysis is appropriate for determining the validity of either.³⁷

³² Even though the use of mergers to effect a freeze-out is more flagrantly coercive than successful tender offers, the latter technique fails to present a meaningful alternative to minority shareholders because of the reduction of the public market for any outstanding stock which results from the offer. Moreover, the tender offer is often only the first step in a freeze-out that is culminated in either a long-form or a short-form merger after the insiders have used the tender offer to acquire the requisite percentage of control. See Soloman, *supra* note 10, at 148.

³³ See, e.g., DEL. CODE ANN. tit. 8, § 253 (1974)(90 percent of outstanding shares of voting stock held by insiders required for short-form merger); N.J. STAT. ANN. § 14A: 10-5(1)(Supp. 1975)(same); N.Y. BUS. CORP. LAW § 905 (McKinney Supp. 1975)(requires 95 percent control); *Levine v. Biddle Sawyer Corp.*, 383 F. Supp. 618 (S.D.N.Y. 1974)(short-form merger). See also ABA-ALI MODEL BUS. CORP. ACT § 75 (1969).

³⁴ See authorities cited note 33 *supra*.

[T]he new private corporation, the parent, having the specified percentage of share ownership in the subsidiary (in this case, the public corporation) requires the shareholders of the public company, without the approval of such holders, to exchange their stock for cash, or debt securities or redeemable stock of the private entity. Thereupon, such public shareholders cease to have an equity interest in the surviving private corporation which is wholly owned by the insiders.

Soloman, *supra* note 10, at 154.

³⁵ See, e.g., DEL. CODE ANN. tit. 8, § 251 (1974); N.Y. BUS. CORP. LAW § 903 (McKinney Supp. 1975). See generally Note, *Freezing Out Minority Shareholders*, 74 HARV. L. REV. 1630, 1630-31 (1961).

³⁶ See Soloman, *supra* note 10, at 154-55; cf. Borden, *supra* note 17, at 988.

³⁷ Comment, *supra* note 14, at 116.

This logic applies even though the method used is an apparently voluntary tender offer or exchange offer because the minority shareholder is placed upon the horns of a very

Juxtaposed against the foregoing discussion, the statutes³⁸ and decisions³⁹ generally have been receptive to going private mergers. Early corporate law required unanimous stockholder approval to accomplish any major change in corporate structure.⁴⁰ Placing a veto power in the hands of a single dissenting shareholder, this standard allowed the dissenter to demand a high price for his compliance with the wishes of the majority. While this unanimity standard was certainly slanted in favor of the dissenter, the states' legislative responses have also proven nonjudicious in their equally oblique concern for management flexibility.⁴¹ State legislators responded with either constitutional provisions⁴² or statutes⁴³ which made fundamental corporate transactions possible with less than unanimous stockholder approval. Such provisions, if unfettered, could often be used to victimize minority shareholders at the whim of the insiders.⁴⁴ Indeed, the states have provided little solace for minority shareholders who are frozen out by means of a merger effected

uncomfortable dilemma: to sell or exchange on terms dictated by the insiders or to retain his shares despite an increasingly narrow public market. Soloman, *supra* note 10, at 171. Moreover, it would make little sense to distinguish between long-form and short-form going private mergers. See generally Note, *The Controlling Influence Standard in Rule 10b-5 Corporation Mismanagement Cases*, 86 HARV. L. REV. 1007 (1973).

³⁸ See note 33 *supra*. See also Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 665 (1974).

³⁹ See, e.g., *Stauffer v. Standard Brands Inc.*, 41 Del. Ch. 7, 187 A.2d 78, 80 (Sup. Ct. 1962) ("[T]he very purpose of the [short-form merger] statute is to provide the parent corporation with a means of eliminating the minority shareholder's interest in the enterprise."); *Beidenkopf v. Des Moines Life Ins. Co.*, 160 Iowa 629, 142 N.W. 434 (1913); *Paterson v. Shattuck Ariz. Copper Co.*, 186 Minn. 611, 244 N.W. 281 (1932); *Brundage v. New Jersey Zinc Co.*, 48 N.J. 450, 226 A.2d 585 (1967); *Wilcox v. Stern*, 18 N.Y.2d 195, 219 N.E.2d 401, 273 N.Y.S.2d 38 (1966) (short-form merger); *Matteson v. Ziebarth*, 40 Wash. 2d 286, 242 P.2d 1025 (1952). But see *Kavanaugh v. Kavanaugh Knitting Co.*, 226 N.Y. 185, 123 N.E. 148 (1919) and *Theis v. Spokane Falls Gaslight Co.*, 34 Wash. 23, 74 P. 1004 (1904), which reflect an early judicial hostility to freeze-outs. See generally HENN, *supra* note 11, § 340.

⁴⁰ *Voeller v. Neilston Warehouse Co.*, 311 U.S. 531, 535 n.6 (1941); *Geddes v. Anaconda Copper Mining Co.*, 245 U.S. 590, 596 (1921). See also Lattin, *A Primer on Fundamental Corporate Changes*, 1 W. RES. L. REV. 3 (1949).

⁴¹ As one commentator noted:

[D]uring the last century the minority shareholder has fallen from a position of superior bargaining [*sic*] strength under the unanimity rule to become a ward of controlling interests under the fair price rule.

Comment, *supra* note 15, at 657. See also Note, *supra* note 35, at 1630-31.

⁴² See, e.g., N.Y. CONST. art. X, § 1; *Brundage v. New Jersey Zinc Co.*, 48 N.J. 450, 226 A.2d 585 (1967) (applying N.J. CONST. art. I, § VII, ¶ 9); HENN, *supra* note 11, §§ 340, 346, at 695, 714.

⁴³ See, e.g., DEL. CODE ANN. tit. 8, §§ 251-53 (1974); N.J. STAT. ANN. § 14A: 10-5 (Supp. 1975); N.Y. BUS. CORP. LAW §§ 903, 905 (McKinney Supp. 1975); ABA-ALI MODEL BUS. CORP. ACT §§ 71, 75 (1969). See also HENN, *supra* note 11, § 346, at 713-17.

⁴⁴ See generally Vorenberg, *supra* note 18.

by corporate insiders. The states' attitude is epitomized by the following remarks:

[T]he merged corporation's shareholder has only one real right; *to have the value of his holding protected*, and that protection is given him by his right to an appraisal. He has no right to stay in the picture, to go along into the merger, or to share in its future benefits. He has no constitutional right to deliberate, consult or vote on the merger, to have prior notice thereof or prior opportunity to object thereto. His disabilities in those respects are the result of his status as a member of a minority, and any cure therefor [must] be presented by the Legislature ⁴⁵

Thus, the dissenter is limited to recovering the "fair value" of his shares as established either by the insiders⁴⁶ or by an appraiser appointed for that purpose.⁴⁷ Sanctioning "a sort of private eminent domain proceeding,"⁴⁸ appraisal statutes call for an attempt to determine what is alternatively entitled the "'market value', 'fair value', 'value', or 'fair cash value'"⁴⁹ of the minority's shares. Unfortunately, accurate measurement of stock value is often impossible.⁵⁰ Thus, the appraisal remedy is merely an inappropriate upshot of the alleged compromise between the

⁴⁵ *Beloff v. Consolidated Edison Co.*, 300 N.Y. 11, 87 N.E.2d 561, 564-65 (1949) (citation omitted) (emphasis added).

⁴⁶ The chance that dissenting shareholders, though dissatisfied with the merger-dictated price for their stock, will accept that price is greatly increased by the probability that the price will not be increased substantially by appraisal.

The crucial evaluation evidence—estimates of future earnings or of salable value of assets—is available to management, but rarely to outsiders. Hence . . . evidentiary problems which beset an outsider seeking appraisal or challenging for unfairness a merger which was timed by insiders make it a rare case in which he will succeed in establishing a value higher than was offered in the merger, in view of the leeway which courts allow to management's judgment. Even though the procedural hurdles, such as burden of proof, are lower for a plaintiff who can, as is likely in "going private" cases, show that the defendants are acting unilaterally and have a conflict of interest, the cases suggest that he will not clear them much more easily than when he must show that the defendants exceeded the bounds of tolerable business judgment.

Brudney, *supra* note 13, at 1024 n. 21. See also Note, *Valuation of Dissenters' Stock Under Appraisal Statutes*, 79 HARV. L. REV. 1453 (1966); Comment, *Valuation of Shares in a Closely Held Corporation*, 47 MISS. L.J. 715 (1976).

⁴⁷ *E.g.*, DEL. CODE ANN. tit. 8, § 262 (1974); N.Y. BUS. CORP. LAW § 623 (McKinney Supp. 1975). The appraisal remedy may be exclusive by statute, *e.g.*, CAL. CORP. CODE § 4123 (West 1955), or by common law, *e.g.*, *Stauffer v. Standard Brands, Inc.*, 41 Del. Ch. 7, 187 A.2d 78 (Sup. Ct. 1962). But see *Blumenthal v. Roosevelt Hotel, Inc.*, 202 Misc. 988, 115 N.Y.S.2d 52 (Sup. Ct. 1952). See generally HENN, *supra* note 11, § 349, at 723-31.

⁴⁸ Vorenberg, *supra* note 18.

⁴⁹ HENN, *supra* note 11, § 349, at 726-27.

⁵⁰ See note 46 *supra*. See generally Comment, *supra* note 46.

minority's desire to retain its equity interest and the insiders' desire for greater flexibility in corporate management.⁵¹

It has become increasingly apparent that the dissenting minority shareholder has little chance under state law of improving his position vis-à-vis the insiders in a going private transaction.⁵² As a result, he has increasingly turned to the federal courts,⁵³ seeking relief under federal securities laws, especially the SEC's Rule 10b-5.⁵⁴ From this has

⁵¹ Appraisal is certainly adequate for a dissenter who desires to retain an equity interest in the surviving corporation. Beyond that, however, the practically insurmountable evidentiary hurdles which prohibit the dissenter from accurately establishing the fair value of his interest make this remedy insignificant in comparison to the right given up in legislative compromise. Speaking from the standpoint of equity, there has been no quid pro quo. See notes 38-46 and accompanying text *supra*. See also Brudney, *supra* note 13; Vorenberg, *supra* note 18.

⁵² See Cary, *supra* note 38.

It is clear that the major protections to investors, creditors, employees, customers, and the general public have come, and must continue to come, from Federal legislation and not from state corporation acts Any attempt to provide such regulations in the public interest through state incorporation acts and similar legislation would only drive corporations out of the state to more hospitable jurisdictions.

Report of the Corporation Law Revision Commission, N.J. STAT. ANN. § 14A, at xi (1969).

On the federal level, however, there has been a somewhat picturesque concern for the plight of the minority:

Faced with the prospect of a forceout merger, or a market reduced to glacial activity and the liquidity of the Mojave Desert, and deprived of most of the benefits of the federal securities laws, how real is the choice of the shareholder confronting the offer of management to acquire his shares, usually not with their own resources, but with the corporation's resources that really belong to him and his fellow shareholders? In short, he usually decides *he damn well better take the money and run*.

Address by SEC Commissioner A. A. Sommer, Jr., "Going Private": A Lesson in Corporate Responsibility, at the Notre Dame Law School, Nov. 1974, reported in [1974-1975 Transfer Binder] CCH FED. SEC. L. REP. ¶ 80,010, 84,696 (1974) (emphasis added).

⁵³ See Ruder, *Challenging Corporate Action Under Rule 10b-5*, 25 BUS. LAW. 75 (1969) (an unsympathetic viewpoint).

⁵⁴ Those sections other than section 10(b) and Rule 10b-5 which are likely to be available to a frozen-out minority shareholder apply only when there has been a nondisclosure or concealment in connection with a securities transaction. *E.g.*, 15 U.S.C. §§ 78m(a)(1), n(e) (1970). Though these sections require that the insiders in a going private transaction disclose their purpose to eliminate the minority in addition to prohibiting fraudulent and deceptive devices, such requirements are clearly inadequate in the face of the inherent unfairness in forcing out minority shareholders. See *Chris-Craft Indus., Inc. v. Piper Aircraft Corp.*, 480 F.2d 341, 362 (2d Cir.), *cert. denied*, 414 U.S. 910 (1973); *cf. Broder v. Dane*, 384 F. Supp. 1312 (S.D.N.Y. 1974). See also notes 38-46 and accompanying text *supra*. See generally Borden, *supra* note 17.

Even though there may be a state cause of action, a federal cause of action should still be available to the dissenting plaintiff, and the federal court could also determine a state claim which arises out of the same securities transaction. See *Superintendent of Ins.*

emerged a substantial discussion⁵⁵ as to whether a cause of action under Rule 10b-5 can or should be extended to investors who would be limited to an appraisal remedy under state law.⁵⁶ The federal courts' attempted

v. Bankers Life & Cas. Co., 404 U.S. 6, 12 (1971); *Herpich v. Wallace*, 430 F.2d 792, 808 (5th Cir. 1970); *O'Neill v. Maytag*, 339 F.2d 764, 767-68 (2d Cir. 1964); cf. *UMW v. Gibbs*, 383 U.S. 715 (1966). See also Annot., 5 A.L.R.3d 1040, 1115-20 (1966).

⁵⁵ See, e.g., Borden, *supra* note 17; Brudney, *supra* note 13; Manning, *The Shareholder's Appraisal Remedy: An Essay for Frank Coker*, 72 YALE L.J. 223 (1962); Vorenberg, *supra* note 18; Note, *Elimination of Minority Share Interest by Merger: A Dissent*, 54 Nw. U.L. Rev. 629 (1959).

⁵⁶ The crux of the problem is whether a 10b-5 cause of action should be allowed where there has been a going private merger with full disclosure. See notes 126 through 151 and accompanying text *infra*. Significantly, the factual context in these cases meets the other elements of a 10b-5 based challenge to corporate mismanagement. See *Green v. Santa Fe Indus., Inc.*, 533 F.2d 1283, *petition for rehearing en banc denied*, 533 F.2d 1309 (2d Cir. 1976); *Marshall v. AFW Fabric Corp.*, 533 F.2d 1277, *petition for rehearing en banc denied*, 533 F.2d 1309 (2d Cir. 1976).

The "purchase or sale" standing requirement, articulated in *Birnbaum v. Newport Steel Corp.*, 193 F.2d 461 (2d Cir.), *cert. denied*, 343 U.S. 956 (1952), is satisfied by a merger. *SEC v. National Sec., Inc.*, 393 U.S. 453, 467 (1969); *accord*, *Swanson v. American Consumer Indus., Inc.*, 415 F.2d 1326, 1330 (7th Cir. 1969); *Vine v. Beneficial Fin. Co.*, 374 F.2d 627, 635 (2d Cir.), *cert. denied*, 389 U.S. 970 (1967) (forced seller under Delaware's short-form merger statute). The continued vitality of the purchaser-seller requirement was recently ensured by the Supreme Court's decision in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975). Notably, elimination of the disclosure requirement mitigates a fortiori any tendency to cling to the deception and reliance elements of common law fraud. See *Pappas v. Moss*, 393 F.2d 865 (3d Cir. 1968); cf. Fleischer, "Federal Corporation Law": An Assessment, 78 HARV. L. REV. 1146 (1965).

Birnbaum also posited the "in connection with" requirement as an essential element to a Rule 10b-5 action under which it was deemed necessary that a securities transaction must have been at the crux of an alleged violation. 193 F.2d at 463-64. The Supreme Court, however, has stated that activity "touching" a securities transaction was sufficient to satisfy the "in connection with" requirement. *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 12 (1971).

Under this view virtually any manipulative activity . . . in furtherance of a plan for going private appears to be actionable under rule 10b-5, provided that plaintiffs establish standing, because going private inevitably involves the eventual "sale" of equity securities by public shareholders to the corporation.

Comment, *supra* note 15, at 648 (footnotes omitted).

In addition, it is readily apparent that the purview of both section 10(b) and Rule 10b-5 goes beyond mechanical adherence to the elements of common law fraud. As stated by the Fifth Circuit in 1960,

[Rule 10b-5] greatly expands the protection frequently so hemmed in by the traditional concepts of common law misrepresentation and deceit, the requirement of privity, proof of specific damage, inadequacy of the right of rescission or right to recover up to par value of stock of a much greater market value.

Hooper v. Mountain States Sec. Corp., 282 F.2d 195, 201 (5th Cir. 1960), *cert. denied*, 365 U.S. 814 (1961); cf. *Travis v. Anthes Imperial Ltd.*, 473 F.2d 515, 519, 527-28 (8th Cir. 1973).

Nevertheless, despite the liberalization of these requirements, there are harbingers of

resolution of this problem has not been truly conclusive, for the decisions portray dramatically inconsistent lines of reasoning.

II. RULE 10b-5 ENTERS THE BOARDROOM: THE MISMANAGEMENT CASES

In *Birnbaum v. Newport Steel Corp.*,⁵⁷ the Second Circuit declared that Rule 10b-5 "was directed solely at that type of misrepresentation or fraudulent practice usually associated with the sale or purchase of securities rather than at fraudulent mismanagement of corporate affairs"⁵⁸ Twelve years later, the same court found Rule 10b-5 applicable where twelve directors of a corporation withheld information from other directors and sought to perpetuate their control by causing the corporation to issue treasury stock to one of the wrongdoers.⁵⁹ Whatever the intended effect of the earlier *Birnbaum* pronouncement,⁶⁰ Rule 10b-5 had entered the boardroom.⁶¹

Recognition of the 10b-5 cause of action for mismanagement⁶² required the development and redefinition of the elements⁶³ of the cause of action. Most notably, the deception⁶⁴ requirement restricted the effec-

narrower construction by the Supreme Court.

Corporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, *except where federal law expressly requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation.*

Cort v. Ash, 422 U.S. 66, 84 (1975)(emphasis added); *cf. Ernst & Ernst v. Hochfelder*, 96 S. Ct. 1375 (1976) (no private cause of action under Rule 10b-5 without an allegation of common law scienter).

⁵⁷ 193 F.2d 461 (2d Cir.), *cert. denied*, 343 U.S. 956 (1952).

⁵⁸ 193 F.2d at 464.

⁵⁹ *Ruckle v. Roto Am. Corp.*, 339 F.2d 24 (2d Cir. 1964).

⁶⁰ One writer suggested that *Birnbaum* meant only that Rule 10b-5 was not intended to prohibit the breach of fiduciary duties imposed solely by state law. Whitaker, *The Birnbaum Doctrine: An Assessment*, 23 ALA. L. REV. 543, 588 (1971).

⁶¹ The Third Circuit had earlier expressed, in dictum, the view that section 10(b) and Rule 10b-5 impose broad fiduciary duties on management and regulate relations which formerly had been the exclusive concern of the states. *McClure v. Borne Chem. Co.*, 292 F.2d 824, 834 (3d Cir.), *cert. denied*, 368 U.S. 939 (1961). Though not a mismanagement case, *A.T. Brod & Co. v. Perlow*, 375 F.2d 393 (2d Cir. 1967), reached beyond frauds "usually associated" with securities transactions. *Id.* at 397.

⁶² "Mismanagement" is used here as the rubric for a broad spectrum of management behavior which is unfair to outsiders, the corporation, or both. Included are transactions which benefit management but serve no justifiable corporate purpose. Of course, to be cognizable under 10b-5, the mismanagement must be "in connection with" the purchase or sale of securities. The term "management" as used in this comment includes officers, directors, majority shareholders, and any other persons or groups who by reason of their positions or stockholdings have the potential advantage of inside information or the ability to control the corporate apparatus.

⁶³ See note 56 *supra*.

⁶⁴ "Deception" as used in the 10b-5 context includes positive misrepresentation, omission, and nondisclosure. "[I]t need not be deception in any restricted common law

tive expansion of the cause of action in some situations in which the plaintiffs were most susceptible to fraudulent mismanagement.⁶⁵ Attempts to skirt the deception requirements, though sometimes successful, were usually dependent on judicial legerdemain and fictions which obfuscated the real issues in the cases.⁶⁶ The cases, most of which were decided by the influential Second Circuit,⁶⁷ are discussed in chronological order to illustrate the meandering of 10b-5 in the boardroom.

A. *Ruckle v. Roto American Corp.*⁶⁸

In a derivative action brought on behalf of Roto American Corporation, the plaintiff alleged that a majority of the directors withheld certain financial statements from the remaining director and sought to perpetuate their control by causing the corporation to issue its treasury stock which was to be resold to one of the wrongdoers. The Second Circuit held that this withholding of information relevant to a proposed stock issuance, if proved, constituted fraud upon the corporation actionable under section 10(b) and Rule 10b-5.⁶⁹ The court rejected the argument that the knowledge of a majority of directors constituted the knowledge of the corporation and, thus, that the corporation was not deceived.⁷⁰ Referring to other types of management wrongdoing,⁷¹ the

sense" *O'Neill v. Maytag*, 339 F.2d 764, 768 (2d Cir. 1964) (finding no deception, therefore no 10b-5 cause of action). In *O'Neill*, the Second Circuit squarely addressed the question whether an allegation of breach of fiduciary duty not involving deception was sufficient to state a 10b-5 cause of action and held that it was not. *Id.* at 767-68.

⁶⁵ See, e.g., *O'Neill v. Maytag*, 339 F.2d 764 (2d Cir. 1964) (use of corporate apparatus by directors to purchase a more favorable controlling position). For an extensive discussion of *O'Neill* and the limitations imposed by the deception requirement, see notes 75 through 83 and accompanying text *infra*.

⁶⁶ See, e.g., *Pappas v. Moss*, 393 F.2d 865, 869 (3d Cir. 1968). For an extensive discussion of *Pappas* and its treatment of the deception requirement, see notes 93 through 101 and accompanying text *infra*.

⁶⁷ A large number of federal securities cases arise in New York and ultimately reach the Second Circuit. The wavering line of decisions from this experienced court indicates the great difficulty in formulating doctrines serviceable in the mismanagement context.

⁶⁸ 339 F.2d 24 (2d Cir. 1964).

⁶⁹ *Id.* at 27.

⁷⁰ *Id.* at 29. General agency law imputes the knowledge of the corporation's agents to the corporation.

[A] corporation is charged with constructive knowledge, regardless of its actual knowledge, of all material facts of which its officer or agent receives notice or acquires knowledge while acting in the course of his employment within the scope of his authority, even though the officer or agent does not in fact communicate his knowledge to the corporation.

3 W. FLETCHER, PRIVATE CORPORATIONS § 790, at 12 (perm. ed. rev. 1975) (footnotes omitted). Imputation of knowledge to the corporation might preclude a finding that the corporation was deceived. However, an exception to the general principle is that

court intimated in dictum that a 10b-5 cause of action might lie even where the entire board of directors acted adversely to the corporation's interests.⁷² The court, however, did not indicate who, if anyone, would be deceived in those circumstances.⁷³ Whether the court would rely on agency rules and fictions to find deception in such a case⁷⁴ or simply find a violation of the Rule in the absence of deception was not clear as the instant case required neither since one director had been deceived. *Ruckle* left only the possibility that Rule 10b-5 could be used to reach mismanagement not involving deception.

*B. O'Neill v. Maytag*⁷⁵

The possibility of stating a 10b-5 cause of action in a case void of deception seemed to be foreclosed when the Second Circuit, less than a month after deciding *Ruckle*, decided a case in which the plaintiff, suing derivatively, alleged that directors and officers had caused the corporation to pay a premium for stock exchanged with another corporation in an effort to eliminate a threat to the wrongdoers' control. Apparently, the entire board of directors had been aware of all of the material facts

where an officer is dealing with the corporation in his own behalf, or is, for any other reason, interested in a transaction adversely to the corporation, knowledge possessed by him in the transaction is not imputable to the corporation

Id. § 819, at 90 (footnote omitted). A qualification to this exception to the general rule states that where the officer is the "sole actor" for the corporation in the transaction, his knowledge will be imputed to the corporation notwithstanding his adverse interests. *Id.* § 827, at 122-23.

In *Ruckle*, the court simply rejected the imputation of knowledge of the majority of the directors to the corporation without expressly attempting to characterize the situation as within one of the agency rules stated above. See 339 F.2d at 29.

⁷¹ The court noted that "in other contexts, such as embezzlement and conflict of interest, a majority or even the entire board of directors may be held to have defrauded their corporation." 339 F.2d at 29.

⁷² *Id.* The court's reference to the embezzlement and conflict of interest examples, see note 71 *supra*, might indicate that the court implicitly relied on the exception to the general rule imputing knowledge to the corporation, see note 70 *supra*. However, to say that the court relied on agency rules—involving the knowledge of the corporation—assumes that the court was actually looking only for *deception* as a basis for a 10b-5 cause of action. Indeed, one writer states that the deception requirement was assumed by the court in *Ruckle*. Note, *supra* note 37, at 1020. It is plausible that the court was really concerned with the *fraudulent* effect of the transaction, and by its reference to other types of mismanagement the court simply recognized the strong reasons for not imputing wrongful actions so as to relieve directors and officers of liability. One cannot confidently determine which aspects of embezzlement and conflict of interest the court found important in deciding that the transaction at hand violated Rule 10b-5.

⁷³ See 339 F.2d at 29.

⁷⁴ See notes 70 through 72 *supra*.

⁷⁵ 339 F.2d 764 (2d Cir. 1964).

relevant to the exchange.⁷⁶ The court defined the issue as whether section 10(b) and Rule 10b-5 impose duties beyond that of honest disclosure.⁷⁷

In resolving this issue, the court noted that state law creates duties between corporate directors and shareholders which exist independently of sales of stock.⁷⁸ Perhaps fearful of full-scale invasion of the province of state corporate regulation,⁷⁹ the court held that the breach of general fiduciary duties without deception does not give rise to liability under Rule 10b-5.⁸⁰ The court distinguished *Ruckle* as an example of an officer acting in violation of both common law duties and the duty imposed by Rule 10b-5.⁸¹ The fact that the deception in *Ruckle* occurred within the corporate structure did not by itself avoid liability under the Rule.⁸²

All attempts to reconcile *O'Neill's* substantive holding with the dictum in *Ruckle* are fruitless. If *Ruckle* is interpreted as assuming a deception requirement but calling for the use of agency principles to find it, then *O'Neill* is arguably consistent with this interpretation since that opinion seems to indicate there was at least one director in *O'Neill* who had knowledge of all the facts but who was not himself adversely interested, and, therefore, whose knowledge could be imputed to the corporation.⁸³ This would preclude a finding of deception. However, the *O'Neill*

⁷⁶ "There can be no serious claim of deceit, withheld information or misstatement of material fact in this case." *Id.* at 767.

⁷⁷ *Id.*

⁷⁸ *Id.* Of course, it is equally true that state-created fiduciary duties do not evaporate when the wrongdoing *does* involve a stock transaction. The statement in the text may simply have indicated the court's belief that section 10(b) and Rule 10b-5 were not intended to enforce purely state-created fiduciary duties. Somewhat different language in *Birnbaum*, see text accompanying note 58 *supra*, has been similarly interpreted. See note 60 *supra*. Assuming the validity of that argument, it still fails to address the proposition that section 10(b) and Rule 10b-5 reflect *federal* interests and, therefore, may impose federal fiduciary duties which may be similar or perhaps broader than state-created duties.

⁷⁹ A similar interpretation was proposed in 6 L. LOSS, SECURITIES REGULATION 3634-38 (2d ed. Supp. 1969).

⁸⁰ 339 F.2d at 767-68. The court quoted the *Birnbaum* language stating that the section and rule reach only those types of fraudulent practices usually associated with the purchase or sale of securities. *Id.* at 768.

⁸¹ *Id.* at 768.

⁸² *Id.*

⁸³ See note 70 *supra*. One writer has reconciled the two cases by viewing *O'Neill* as involving the nondisclosure of motives in contrast to the nondisclosure of facts concerning value in *Ruckle*. Presumably, the latter impairs the corporation's investment judgment and thereby falls within the proscriptions of 10b-5. Fleischer, *supra* note 56, at 1165-66. However, knowledge of the fraudulent motives of insiders is probably equally important to investors. On that assumption the court in *O'Neill* should have found a type of deception cognizable under the rule, but, of course, it did not. See *Israels, Corporate Purchase of Its Own Shares—Are There New Overtones?*, 50 CORNELL L.Q. 620, 626 (1965).

court seems to have attached no importance to the possible disinterestedness of any directors or officers and simply distinguishes *Ruckle* as a case in which some director was deceived. Thus, the Second Circuit had, at least for the meantime, engrafted the deception requirement onto the 10b-5 cause of action.

C. *Vine v. Beneficial Finance Co.*⁸⁴

Plaintiff, a shareholder of Crown Finance, alleged that Beneficial Finance Company conspired with officers and directors of Crown in a scheme to acquire class B stock from them; then to make a tender offer to acquire 95 percent of Crown's outstanding stock; and finally to effect a short-form merger in which the directors and officers would be preferred. Plaintiff alleged that the class A shareholders who accepted the tender offer were deceived because they did not know of the fraudulent scheme. Although he did not accept the allegedly deceptive tender offer, plaintiff complained that the result of the deception was to make him a forced seller because Crown disappeared in the merger and plaintiff's shares were thereby involuntarily converted into a claim for cash.⁸⁵

The Second Circuit, after finding the plaintiff was a forced seller with standing to sue under Rule 10b-5,⁸⁶ noted that the distinctive nature of the short-form merger enabled defendant, by deceiving some shareholders, to cause others to become sellers.⁸⁷ The court held that a showing of reliance on the deception was unnecessary, at least where no volitional act was required and the forced sale was the exact result intended by the wrongdoer.⁸⁸

Although the deception requirement remained viable,⁸⁹ *Vine* appears to have introduced the possibility that deception could consist of

⁸⁴ 374 F.2d 627 (2d Cir.), *cert. denied*, 389 U.S. 970 (1967).

⁸⁵ 374 F.2d at 630-31.

⁸⁶ *Id.* at 634. The court stated that requiring plaintiff to surrender his stock would have been a needless formality.

⁸⁷ *Id.* at 635. This phenomenon satisfied the "in connection with" limitation of section 10(b) and Rule 10b-5.

⁸⁸ *Id.* In *List v. Fashion Park, Inc.*, 340 F.2d 457 (2d Cir.), *cert. denied*, 382 U.S. 811 (1965), the plaintiff alleged that an insider bought stock from him without disclosing material facts, *viz.*, the possibility of a merger in which a tender offer for such shares would be greater than the price at which plaintiff was selling to the insider. The court stated a reliance test: whether the misrepresentation is a substantial factor in determining the course of conduct resulting in the injury. 340 F.2d at 462. "Our examination of the authorities satisfies us that [reliance] also is carried over into civil suits under Rule 10b-5." *Id.* at 463. The *Vine* opinion acknowledged *List*, 374 F.2d at 635, but rejected its application in the particular circumstances of the case.

⁸⁹ In a footnote, the *Vine* panel distinguished *O'Neill* as a case in which there had been no deception. 374 F.2d at 634 n.8. Consequently, the Second Circuit apparently continued to require some sort of deception.

nondisclosure of motives in a transaction.⁹⁰ A similar rationale had seemingly escaped the *O'Neill* court.⁹¹ Furthermore, the deception requirement brought forth its concomitant—the doctrine of reliance—which burdened the court with yet another issue to be either resolved or avoided.⁹²

*D. Pappas v. Moss*⁹³

In this Third Circuit case, the board of directors unanimously authorized an issuance of stock to themselves. Under the state corporate law, an interested board could authorize a sale of stock to themselves without shareholder approval, but the directors had the burden of showing the fairness of the transaction. In a derivative suit for damages, the plaintiff complained that the price set by the directors was fraudulently low and violated Rule 10b-5. The Third Circuit was thus faced with the *O'Neill* situation,⁹⁴ as it was confronted with a fully informed board of directors who allegedly had defrauded their corporation. Short of discarding the deception requirement entirely,⁹⁵ the court stated that

if a "deception" is required in the present context, it is fairly found by viewing this fraud as though the "independent" stockholders were

⁹⁰ From the opinion, it appears that the class A shareholders who had accepted the tender offer had not been deceived as to facts, in the ordinary sense of facts concerning the value of their shares, but had been left uninformed of the defendants' motivations for the tender offer, *viz.*, the effectuation of an unfair merger. Yet the court found the scheme was "a classic example of deception." *Id.* at 635. This aspect of *Vine* may have simply foreshadowed the later belief, in *A. T. Brod & Co. v. Perlow*, 375 F.2d 393, 397 (2d Cir. 1967) (not a mismanagement case), that 10b-5 reaches all fraudulent schemes whether of the "garden variety of fraud" or a unique form of deception. The deception in *Brod* was nondisclosure of intention to default on a securities purchase contract.

⁹¹ See note 83 *supra*.

⁹² *Vine* did not introduce the reliance requirement, see note 88 *supra*, but it illustrated the Second Circuit's ability to avoid the reliance doctrine when the circumstances required. The Second Circuit thus demonstrated some degree of flexibility in handling diverse mismanagement cases.

⁹³ 393 F.2d 865 (3d Cir. 1968).

⁹⁴ See note 76 and accompanying text *supra*. One fact distinguishing *O'Neill* from the instant case was that in *O'Neill* there apparently were some fully informed yet disinterested directors, while in *Pappas* the opinion seems to indicate that the entire board was interested in the allegedly fraudulent transaction. This might be significant if the nondisclosure of motives gives rise to liability. See note 83 and text accompanying note 90 *supra*.

⁹⁵ At one point the court seemed prepared to find fraud actionable under 10b-5 without mention of deception.

[W]e think that where, as here, a board of directors is alleged to have caused their corporation to sell its stock to them and others at a fraudulently low price, a violation of Rule 10b-5 is asserted.

393 F.2d at 869.

standing in the place of the defrauded corporate entity Certainly the deception of the independent stockholders is no less real because, "formalistically," the corporate entity was the victim of the fraud.⁹⁶

The lower court had found that the board's resolution authorizing the stock issuance contained at least two material misrepresentations.⁹⁷ Arguments that there must be reliance on the misrepresentations by the party with standing to sue were rejected.⁹⁸ The Third Circuit thus injected a new fiction—the identification of the corporation with the disinterested shareholders—into the 10b-5 analysis. Paradoxically, the court rejected the rigid adherence to the technical niceties of agency law, finding that it would "exalt form over substance."⁹⁹

In *Pappas*, the Third Circuit strained to apply 10b-5 to a transaction touching securities which, if proved, was obviously unfair and equally as harmful to the corporation and its investors as face-to-face deceptive practices.¹⁰⁰ The case thus further exposed the problems created by the retention of the deception requirement in the mismanagement context.¹⁰¹

*E. Schoenbaum v. Firstbrook*¹⁰²

Minority shareholders of Banff Oil, Ltd., brought a derivative suit against Aquitaine Company, the majority shareholder, alleging that Aquitaine had used its control to cause Banff to sell 500,000 shares of Banff treasury stock to Aquitaine at inadequate prices knowing that an undisclosed oil find had increased the actual value of the Banff stock.

⁹⁶ *Id.*

⁹⁷ *Id.* at 868-69.

⁹⁸ *Id.* The defendants had argued that only where shareholder approval is required can a unanimous board of directors deceive their corporation.

⁹⁹ *Id.*

¹⁰⁰ Apparently, if there had been no misrepresentations in the resolution, the court could have found that the transaction, although fraudulent in the broader sense, was insulated from the reach of 10b-5. Yet the fraudulent effects of the transactions would have been the same.

¹⁰¹ Although it noted that technical application of rules of agency would restrict the application of Rule 10b-5 in a way which is at odds with its basic purpose, 393 F.2d at 869, the court did not apply the same reasoning with respect to the deception element. Of course, on the facts before the court it was unnecessary to decide the case on such broad grounds. Supposing the directors had made full disclosure to the shareholders so as to avoid liability under 10b-5, see note 40 *supra*, the principal role of the Rule would be to enable the shareholders and corporation to seek extracorporate remedies under state law using the information disclosed to them. See Note, *supra* note 37, at 1028-29.

¹⁰² 405 F.2d 200, *rev'd on rehearing en banc*, 405 F.2d 215 (2d Cir. 1968), *cert. denied*, 395 U.S. 906 (1969).

The interested directors of Banff had not voted on the resolution authorizing the stock sale.

A panel of the Second Circuit held that since all of the Banff directors were fully informed and only the disinterested directors had voted, there was no deception of the corporation.¹⁰³ On rehearing en banc, the Second Circuit reversed, holding that Aquitaine's exercise of a *controlling influence* to induce a transaction unfair to Banff constituted "an act, practice, or course of business which operates as a fraud" in violation of the third clause of Rule 10b-5.¹⁰⁴ As an alternative holding, the court added: "Moreover, Aquitaine and the directors of Banff were guilty of deceiving the [other] stockholders of Banff."¹⁰⁵ In *Schoenbaum*, the Second Circuit thus abandoned the deception requirement, at least in the setting of that case,¹⁰⁶ and unveiled a new tool: the

¹⁰³ 405 F.2d at 212. The knowledge of those disinterested directors was imputed to the corporation.

¹⁰⁴ *Id.* at 219-20.

¹⁰⁵ *Id.* at 220. Judge Hays, writing for the majority, cited *Pappas v. Moss*, 393 F.2d 865 (3d Cir. 1968). In the original *Schoenbaum* decision, Judge Hays had dissented:

In order to establish fraud it is surely not necessary to show that the directors deceived themselves. It must be enough to show that they deceived the shareholders, the real owners of the property with which the directors were dealing.

405 F.2d at 215. Although Judge Hays had been willing, at that time, to rely on the *Pappas* rationale, the use of the word "moreover" in the language quoted in the text accompanying this note indicates that the deception of the shareholders was only an alternative holding in the en banc opinion.

¹⁰⁶ Whether the controlling influence test will be serviceable in a wide variety of factual situations remains to be seen. A few cases have been decided on this ground. For example, in *Shell v. Hensley*, 430 F.2d 819 (5th Cir. 1970), a derivative suit, it was alleged that the defendant, a director, sold control of his corporation at a premium to another corporation, NSI, and that the defendant and others then caused the corporation to buy worthless securities from NSI so that the latter would have sufficient funds with which to pay for its purchase of control. The Fifth Circuit held that deception need not be shown when the use of controlling influence is alleged. *Id.* at 827. The court reasoned that

[w]hen a person who is dealing with a corporation in a securities transaction denies the corporation's directors access to material information known to him, the corporation is disabled from availing itself of an informed judgment on the part of its board We can make no meaningful distinction between this situation and the one at hand [T]he corporation is no less disabled from availing itself of an informed judgment than if the outsider had simply lied to the board. In both situations the determination of the corporation's choice of action in the transaction in question is not made as a reasonable man would make it if possessed of all the material information known to the other party to the transaction.

Id. This language seems broad enough to encompass a diversity of mismanagement cases. The controlling influence rationale could provide a basis for decisions such as *Drachman v. Harvey*, 453 F.2d 722 (2d Cir. 1971), *modified on rehearing en banc*, 453 F.2d 736 (2d Cir. 1972) (causing redemption of convertible debentures to preserve control). The concept

controlling influence test.¹⁰⁷

*F. Popkin v. Bishop*¹⁰⁸

Popkin, a minority shareholder of Bell, sued derivatively and on behalf of other minority shareholders to enjoin a long-form merger of Bell into its parent corporation, Equity,¹⁰⁹ at allegedly inadequate and unfair exchange ratios. The terms of the proposed merger, presumably required by a settlement of earlier litigation,¹¹⁰ were admittedly fully disclosed, and there was no misrepresentation.¹¹¹

The Second Circuit assumed *arguendo* that the exchange ratios were unfair¹¹² but held that without deception the overreaching alone was not cognizable under 10b-5.¹¹³ The court attempted to reconcile its instant decision with its earlier decision in *Schoenbaum* by pointing to that decision's alternative holding, that Aquitaine and directors of Banff had deceived the other Banff shareholders.¹¹⁴ The court thus concluded that the emphasis on self-dealing in *Schoenbaum* had not eliminated nondisclosure as a "key issue" in 10b-5 mismanagement cases.¹¹⁵ The court also distinguished the *Schoenbaum*-type cases as ones where state law does not demand prior shareholder approval of the transaction.¹¹⁶ In such situations "it makes sense to concentrate on the impropriety of the conduct itself rather than on the 'failure to disclose' it," because full disclosure will rarely occur.¹¹⁷ The court concluded that disclosure "has

of fraud may be broad enough to include the use of controlling influence to effect a securities transaction which serves no valid corporate purpose. Cox, *Fraud Is In the Eyes of the Beholder: Rule 10b-5's Application to Acts of Corporation Mismanagement*, 47 N.Y.U.L. REV. 674, 690 (1972).

¹⁰⁷ One commentator has suggested that the test should be a factual inquiry in each case to determine whether in a particular situation an individual had the power, through either voting power or demonstrated influence of some other kind, to direct the actions of the corporation.

Note, *supra* note 37, at 1034 (emphasis added).

¹⁰⁸ 464 F.2d 714 (2d Cir. 1972).

¹⁰⁹ Equity possessed a 51.7 percent control interest, far short of the 90 percent required for a short-form merger in New York. This meant that shareholder approval was required, and the minority could sue for injunctive relief prior to the consummation of the merger.

¹¹⁰ 464 F.2d at 716.

¹¹¹ Plaintiff conceded full disclosure in his brief. *Id.* at 718.

¹¹² *Id.* at 717.

¹¹³ *Id.* at 718.

¹¹⁴ *Id.* at 719. The court attempted to weaken Judge Hays' *Schoenbaum* opinion by stating that he had "suggested" that self-dealing was itself a 10b-5 violation. *Id.* In light of Judge Hays' language in *Schoenbaum*, this conclusion appears unwarranted. See text accompanying note 105 *supra*.

¹¹⁵ 464 F.2d at 719-20.

¹¹⁶ *Id.* at 719.

¹¹⁷ *Id.*

special relevance to merger transactions that, under state law, must be subjected to shareholder approval."¹¹⁸ In such transactions the principal federal interest is in ensuring that shareholder approval is "fairly sought and freely given."¹¹⁹

The court, in answering the plaintiff's argument that disclosure is irrelevant where the minority is powerless, held that disclosure enables the minority to sue under state law to enjoin the merger¹²⁰ and that, even where the exclusive state remedy is appraisal, 10b-5 ensures that shareholders have the information to intelligently exercise their appraisal rights.¹²¹

Since the court believed that Equity's ability to push through the merger with or without other shareholders' votes could not defeat federal injunctive relief,¹²² it seemed to require deception even where reliance would not be necessary.¹²³ By its decision in *Popkin*, the Second Circuit apparently abandoned "controlling influence" as an independent test¹²⁴ and reintroduced the strict requirement of deception.¹²⁵

¹¹⁸ *Id.* at 720.

¹¹⁹ *Id.*

¹²⁰ *Id.* Of course, this would be true only in long-form mergers. In a short-form merger the directors of the parent corporation can effect a de facto merger and then simply give notice of their rights to the minority shareholders. *See, e. g.*, DEL. CODE ANN. tit. 8, § 253 (1974). Thus, the court's holding reduces 10b-5 to a role of enforcing state law.

¹²¹ 464 F.2d at 720 n.16. Of course, this may be of little comfort to a shareholder who is squeezed-out.

¹²² *Id.* at 717-18.

¹²³ The court thus recognized the limited utility of "reliance" but adhered to "deception," an equally inhibiting factor in the application of 10b-5 in the mismanagement context.

¹²⁴ The court did not deny the wrongfulness of using controlling influence to effect unfair transactions, *see* 464 F.2d at 719, but simply added the requirement that there be some type of deception. For an illustration of the use of the controlling influence test in conjunction with the deception requirement, *see* Note, *supra* note 37, at 1044.

¹²⁵ A more recent case, *Schlick v. Penn-Dixie Cement Corp.*, 507 F.2d 374 (2d Cir. 1974), *cert. denied*, 421 U.S. 976 (1975), involved the use of control to manipulate a subsidiary's stock prices so as to effect an unfair merger. Although there were allegations of deceptive proxy statements, the Second Circuit panel appeared to deemphasize the deception in finding "a scheme to defraud which includes market manipulation and a merger on preferential terms, of which the proxy omissions and misrepresentations [were] only one aspect." 507 F.2d at 381. In dictum, the court also implied that Rule 10b-5 goes beyond common law fraud. *Id.* at 378 n.8.

III. A CAUSE OF ACTION UNDER RULE 10b-5 IS SUSTAINED ABSENT NONDISCLOSURE

A. *Marshel v. AFW Fabric Corp.*¹²⁶

In July 1968, and again in 1969, the owners of Concord Fabrics, Incorporated, a private corporation, made public offerings of 500,000 shares of Concord stock which realized, upon sale, net proceeds to the owners of approximately \$8 million.¹²⁷ In January 1975, following a generally fluctuating earnings history and in the immediate wake of a depressed stock market,¹²⁸ the insiders initiated a plan to go private. As the initial part of that plan, the insiders set up a shell corporation for the purpose of concluding a long-form merger.¹²⁹ Although the plan originally involved an offer to purchase the outstanding shares,¹³⁰ this offer was withdrawn in the face of a suit to enjoin the transactions.¹³¹ Instead, since the insiders possessed sufficient control under New York law¹³² to ensure stockholder approval of a long-form merger, that procedure for going private was chosen to supersede the original proposal.¹³³

Apparently reacting to the large discrepancy between the price paid for Concord stock when it "went public" and the merger-dictated price,¹³⁴ the minority stockholders amended their complaint to include a demand that the merger be enjoined. Reversing the district court's denial of the plaintiffs' motion for a preliminary injunction under Rule 10b-5 on the ground that nondisclosure was not alleged,¹³⁵ the Second Circuit, per Judge Hays, held that

¹²⁶ 533 F.2d 1277, *petition for rehearing en banc denied*, 533 F.2d 1309 (2d Cir. 1976).

¹²⁷ 533 F.2d at 1278-79. The exact total was \$7.8 million. In addition, these sales reduced the original owners' holdings to 68 percent of Concord's outstanding stock, 32 percent being held by approximately 1,000 public stockholders. *Id.* at 1279.

¹²⁸ Concord incurred severe losses during 1971 and 1972, and from 1969 through 1974 the price of its stock varied between \$25 and \$1 per share, the latter price occurring just before the proposed merger. *Id.* at 1279.

¹²⁹ *Id.*

¹³⁰ *Id.* The purchase was to be financed by loans which were to ultimately become obligations of the corporation after it had gone private. *Compare id.* at 1279, *with id.* at 1281.

¹³¹ *Id.* at 1279.

¹³² See N.Y. BUS. CORP. LAW § 903 (McKinney Supp. 1975).

¹³³ 533 F.2d at 1279.

¹³⁴ Even though the 1968 offering price was \$15 per share and that for the 1969 offering was \$20 per share, \$3 per share was proposed as part of the original purchase offer and as the published merger-dictated price. *Id.* at 1278-79.

¹³⁵ *Id.* at 1282. In connection with this point, Judge Hays stated that a merger, accomplished by utilizing corporate funds, solely for the benefit of the insiders was a fraudulent scheme as a matter of law. Further, he stated that disclosure was irrelevant since

when controlling stockholders and directors of a publicly-held corporation cause it to expend corporate funds to force elimination of minority stockholders' equity participation for reasons not benefiting the corporation but rather serving only the interests of the controlling stockholders such conduct will be enjoined pursuant to Section 10(b) and Rule 10b-5 ¹³⁶

While so holding, the court also stated that the existence of a state appraisal remedy could not be used to negate the minority's federal rights.¹³⁷ However, this statement, as well as the general breadth of the court's holding, is blurred by the fact that, though ostensibly ignoring propositions regarding state law,¹³⁸ the court noted that the proposed merger had been enjoined in state court proceedings.¹³⁹

*B. Green v. Santa Fe Industries, Inc.*¹⁴⁰

Any doubt as to whether the *Marshall* holding was as broad as its language seemed to indicate is not forestalled by the Second Circuit's decision in *Green*. The *Green* court was confronted with a proposed short-form merger which, although clearly meeting the requirements of applicable state law,¹⁴¹ was ostensibly more coercive than a long-form merger in *Marshall*.

Prior to the initiation of the transactions which gave rise to the conflict in *Green*, the plaintiffs were minority stockholders in Kirby Lumber Company. Santa Fe Natural Resources, the wholly owned sub-

it would surely be anomalous to hold that a cause of action is stated under § 10(b) and Rule 10b-5 when the fraudulent conduct in connection with a purchase or sale of securities includes deception but that similarly fraudulent practices carried out with prior disclosure to the helpless victim do not give rise to a Rule 10b-5 claim. Neither the statutory language nor the broadly remedial purposes of the Act . . . allow such a distinction.

Id.

¹³⁶ *Id.* at 1281. The court easily found the "in connection with" and "purchase or sale" requirements satisfied. *Id.*, citing, e.g., *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 10-13 (1971). See generally note 56 *supra*.

¹³⁷ 533 F.2d at 1281, citing *Popkin v. Bishop*, 464 F.2d 714, 718 (2d Cir. 1972).

¹³⁸ *Id.* at 1281.

¹³⁹ *Id.* at 1280 n.3.

¹⁴⁰ 533 F.2d 1283, *petition for rehearing en banc denied*, 533 F.2d 1309 (2d Cir. 1976).

¹⁴¹ See DEL. CODE ANN. tit. 8, § 253 (1974) (permitting a short-form merger by a majority controlling 90 percent of a corporation's stock). Additionally, for purposes of consideration of the motion to dismiss, the defendants conceded both that the sole purpose of the merger was to freeze-out the minority and that there was no legitimate corporate purpose. See 533 F.2d at 1285. These concessions would be irrelevant vis-à-vis the legitimacy of the transaction under Delaware corporation law. See *Abelow v. Midstates Oil Corp.*, 41 Del. Ch. 145, 189 A.2d 675 (Sup. Ct. 1963); *Stauffer v. Standard Brands, Inc.*, 41 Del. Ch. 7, 187 A.2d 78 (Sup. Ct. 1962).

sidiary of Santa Fe Industries, Inc., owned approximately 95 percent of Kirby Lumber's stock.¹⁴² As part of its plan to go private under the Delaware short-form merger statute, Santa Fe Natural Resources created a shell corporation, to be ultimately merged into Kirby Lumber and, pursuant to Delaware law, completed the merger without prior notice to Kirby's minority stockholders.¹⁴³ Subsequently, Santa Fe Natural Resources informed the minority of both the merger and of their right under Delaware law to either accept the merger-dictated price for their stock or to seek an appraisal.¹⁴⁴ The minority sought injunctive relief instead. The minority framed its federal complaint under Rule 10b-5 in terms of a request for "money damages and further relief as may be just,"¹⁴⁵ the essence of its claim being that gross undervaluation of their stock mandated a rescission of the merger.¹⁴⁶

Emphasizing the unavailability of injunctive relief because of the absence of a premerger notice requirement under state law, Judge Medina, speaking for the Second Circuit only 5 days after the court's opinion in *Marshel*, stated:

[A] complaint alleges a claim under Rule 10b-5 when it charges, in connection with a Delaware short-form merger, that the majority has committed a breach of its fiduciary duty to deal fairly with minority shareholders by effecting the merger without any justifiable business purpose.¹⁴⁷

Furthermore,

whether full disclosure has been made is not the crucial inquiry since it is the merger and the undervaluation which constitute the fraud, and not whether or not the majority determines to lay bare their real motives. If there is no valid corporate purpose for the merger, then even the most brazen disclosure of that fact to the minority shareholders in no way mitigates the fraudulent conduct.¹⁴⁸

¹⁴² 533 F.2d at 1287-88.

¹⁴³ *Id.* at 1288.

¹⁴⁴ *Id.*; see *Stauffer v. Standard Brands, Inc.*, 41 Del. Ch. 7, 187 A.2d 78 (Sup. Ct. 1962); cf. DEL. CODE ANN. tit. 8, § 262 (1974).

¹⁴⁵ 533 F.2d at 1288.

¹⁴⁶ *Id.* For a discussion of the merits of the valuation process see note 46 and accompanying text *supra*.

¹⁴⁷ 533 F.2d at 1291 (though low valuation alone would not justify intervention of the federal courts).

¹⁴⁸ *Id.* at 1292. The import of the court's language here is obscure. First, saying that nondisclosure is not "crucial" means that it is more important than if it were not relevant to the inquiry. This language could mean that nondisclosure is "not the crucial inquiry" when both a short-form merger and undervaluation are alleged, but such an interpretation is hard to square with the court's indicated concern over the absence of pre-merger notice. However, the meaning could be that nondisclosure *is* crucial when undervaluation of

The majority opinion specifically omitted making a recommendation for relief on remand.¹⁴⁹ However, Judge Mansfield's concurring opinion, though merely echoing much of the reasoning of the majority,¹⁵⁰ did make an attempt to articulate an appropriate remedy. In essence, his recommendation was that if no legitimate corporate purpose was shown, the merger should be set aside; but if such was not feasible, damages, based on the difference between the fair buy-out price and the unfair price set by the insiders, should be awarded.¹⁵¹

IV. *Marshall and Green*: AN ANALYSIS

Stated as concisely as possible, *Marshall* and *Green* mean at least¹⁵² that a long-form or short-form merger¹⁵³ plus undervaluation equals a violation of Rule 10b-5, even without deception, unless the insiders can show a justifiable business reason for the going private transaction.¹⁵⁴

In *Green*, the Second Circuit purported to find support in its earlier *Popkin*¹⁵⁵ decision for holding that nondisclosure is not an essential element of a 10b-5 cause of action.¹⁵⁶ The court found this support in *Popkin*'s distinction between transactions which required prior shareholder approval from those that do not.¹⁵⁷ Supposedly, in the former transactions, disclosure has special relevance, while in the latter, disclo-

shares is not alleged. Although the latter view would preclude the logical next step to declare short-form mergers to be per se violations, the ultimate construction of this language is uncertain. Secondly, if the court has said that nondisclosure is crucial when there is undervaluation, then under the instant language, absent the allegations, no 10b-5 fraud exists, even though there is no valid corporate purpose. The problems encountered in adequately valuing shares make a full consideration of this problem exigent. See note 46 *supra*.

¹⁴⁹ *Id.* at 1294.

¹⁵⁰ Compare *id.* at 1285-94 (majority opinion), with *id.* at 1294-99 (Mansfield, J., concurring).

¹⁵¹ *Id.* at 1294. Judge Moore dissented. Harkening back to *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), the dissent complained that the court's decision was incongruous with the language of Rule 10b-5, prior decisions construing it, and general principles of federalism. These, in his view, should have mandated approval of the instant transaction largely because "[t]he sovereign state of Delaware in its legislative wisdom enacted a statute" 533 F.2d at 1300.

¹⁵² If there is no undervaluation alleged, the meaning is unclear. See note 148 *supra*.

¹⁵³ There is ample support for the proposition that the two forms of merger are, for "going private" purposes, essentially the same. In addition, the same analysis should apply with a tender offer or exchange offer or a reverse stock split. See notes 30 through 37 and accompanying text *supra*.

¹⁵⁴ See notes 16 through 28 and 126 through 151 and accompanying text *supra*.

¹⁵⁵ *Popkin v. Bishop*, 464 F.2d 714 (2d Cir. 1972). For a discussion, see notes 108 through 125 and accompanying text *supra*.

¹⁵⁶ *Green v. Santa Fe Indus., Inc.*, 533 F.2d 1283, 1291-92 (2d Cir. 1976).

¹⁵⁷ *Id.* at 1291.

sure is irrelevant and the crucial issue is the conduct itself.¹⁵⁸ The practical distinction between those types of transactions, however, is meaningless when the majority has the requisite voting power to force the transaction and the minority is relegated to state appraisal rights.¹⁵⁹ Both *Marshel*¹⁶⁰ and *Green*¹⁶¹ imply this reality, although the *Popkin* opinion found solace for the powerless minority in the ability to sue under state law or to intelligently exercise appraisal rights.¹⁶² *Marshel* found that the existence of state appraisal rights could not negate rights under federal law.¹⁶³ Furthermore, both *Marshel* and *Green* left *Popkin* undisturbed,¹⁶⁴ although the *Green* court noted there might be room to criticize *Popkin*'s nondisclosure requirement as "illusory" in those cases where the minority is powerless to avoid the transaction.¹⁶⁵ Thus, the continuing vitality of *Popkin* is uncertain. One possible answer to the resultant ambiguity is that *Green* retreated from *Marshel* and found special coerciveness in the short-form merger context. Nevertheless, this is also suspect since *Green* makes no attempt to qualify or limit *Marshel*.¹⁶⁶

Since both *Marshel* and *Green* discussed *Schoenbaum*¹⁶⁷ and at least impliedly acknowledged its current vitality,¹⁶⁸ and since *Popkin*'s

¹⁵⁸ *Id.* at 1292, quoting *Popkin v. Bishop*, 464 F.2d 714, 719 (2d Cir. 1972).

¹⁵⁹ See notes 45 through 52 and accompanying text *supra*.

¹⁶⁰ In *Marshel*, the transaction was a long-form merger requiring shareholder approval. Yet the court found a 10b-5 cause of action despite the absence of nondisclosure. Apparently, the court saw the instant situation as indistinguishable from cases where shareholder approval is not required.

¹⁶¹ [T]he shareholders in *Marshel* were also afforded the opportunity to seek pre-merger injunctive relief. We regard the unavailability of this additional remedy in the case before us as further justification for the intervention of the federal courts to remedy any fraudulent conduct.

533 F.2d at 1291 (*emphasis added*). Furthermore, the court acknowledged that the majority's control in *Popkin* made it inevitable that minority opposition would have been futile. *Id.* at 1292.

¹⁶² See notes 120 & 121 accompanying text *supra*.

¹⁶³ *Marshel v. AFW Fabric Corp.*, 533 F.2d 1277, 1281 (2d Cir. 1976), citing *Popkin v. Bishop*, 464 F.2d 714, 718 (2d Cir. 1972).

¹⁶⁴ *Marshel* distinguished *Popkin* as a case where the propriety of the merger itself was not challenged. 533 F.2d at 1282.

Green found that there was a justifiable business purpose in *Popkin* in that a prior settlement required the merger. Therefore, *Popkin* was distinguished. 533 F.2d 1291.

¹⁶⁵ 533 F.2d at 1292.

¹⁶⁶ In fact, the *Green* opinion cites *Marshel* with apparent approval of its justifiable business purpose requirement. *Id.* at 1291.

¹⁶⁷ *Schoenbaum v. Firstbrook*, 405 F.2d 200 (2d Cir.), *rev'd on rehearing en banc*, 405 F.2d 215 (2d Cir. 1968), *cert. denied*, 395 U.S. 906 (1969). For a discussion, see notes 102 through 107 and accompanying text *supra*.

¹⁶⁸ See *Marshel v. AFW Fabric Corp.*, 533 F.2d 1277, 1281-82 (2d Cir. 1976); *Green v. Santa Fe Indus., Inc.*, 533 F.2d 1283, 1290 (2d Cir. 1976).

treatment of *Schoenbaum* is inherently indefensible,¹⁶⁹ the *Green* court would have been wiser to concentrate on the applicability of *Schoenbaum*'s controlling influence test. In essence, both *Green* and *Marshel*, as well as *Schoenbaum*, involved the unfair use of controlling influence.¹⁷⁰ Presumably, if there had been justifiable corporate purposes for the transactions in *Green* and *Marshel*, the use of controlling influence could have been described as "fair" and therefore not proscribed by *Schoenbaum*. In this vein the results in *Marshel* and *Green* have a solid foundation in prior law. Moreover, the application of the *Schoenbaum* rationale is inherently more flexible than ad hoc variations of the deception requirement.¹⁷¹

The authors suggest that an unarticulated controlling influence standard underlies the court's rationale in both *Green* and *Marshel*. Though soundly distinguishing *Popkin* as involving a justifiable corporate purpose,¹⁷² the court digressed and thus missed an opportunity to further develop and refine an already existing legal theory—the *Schoenbaum* controlling influence standard.

V. CONCLUSION

Promulgated to protect investors who deal in nationally registered securities,¹⁷³ Rule 10b-5 would be almost fully emasculated if it were limited to the prohibition of transactions which also violate state laws concerning corporate management.¹⁷⁴ The *Green* and *Marshel* decisions avoid this emasculation by refusing to restrict 10b-5 to those cases involving nondisclosure, and thereby reach those corporate transactions closely connected with the sale or purchase of securities which might

¹⁶⁹ See note 14 and accompanying text *supra*.

¹⁷⁰ Compare notes 102 through 107 and accompanying text *supra*, with notes 126 through 151 and accompanying text *supra*.

¹⁷¹ For a discussion of the difficulties and fictions involved in applying the deception requirement, see notes 70 through 72 and 83 *supra*.

On the other hand, the *Schoenbaum* rationale would apply to any transaction involving the sale or purchase of securities in which someone exercises a "controlling influence" to reach an unfair result. See note 106 *supra*.

¹⁷² *Green v. Santa Fe Indus., Inc.*, 533 F.2d 1283, 1291 (2d Cir. 1976). However, the court did not end its discussion of *Popkin* by distinguishing that decision. Instead, the court went on to find additional support in *Popkin*'s distinguishing of transactions requiring prior shareholder approval from those that do not. See notes 157 & 158 and accompanying text *supra*. This distinction alone would have no significance under a controlling influence test since in both types of transactions, the majority unfairly freeze-out the minority.

¹⁷³ See note 4 *supra*.

¹⁷⁴ If the scope of Rule 10b-5 were merely a function of state law, some states, for example, Delaware, could immunize insiders from liability for fraudulent conduct which concededly would affect investor confidence in the securities market.

affect investor confidence in the securities market. Furthermore, these decisions can serve to reduce the number of 10b-5 litigated going private cases by forcing potential defendants to consider the justifications for a transaction before it is culminated.¹⁷⁵ Since the value of any judicial standard is a function of its ability to prevent litigation, *Green* and *Marshel* may prove to be the most significant 10b-5 decisions in recent years.

Despite the potential that exists in these decisions for a realistically consistent standard of conduct for corporate insiders considering a going private transaction, there are indications that it will never be realized. Foremost among these indicators is the language of the Second Circuit's per curiam refusal to rehear, en banc, *Marshel* and *Green*.¹⁷⁶ Apparently unconvinced that the decisions in *Green* and *Marshel* would ultimately survive, the author of the per curiam opinion calls for a decision by the United States Supreme Court in the name of efficient judicial administration.¹⁷⁷ Even if the validity of the court's concern for administrative matters is conceded, it is difficult to understand the pregnant silence concerning the validity of either decision.¹⁷⁸ Could it be possible that the Second Circuit is not convinced that the undermining of *Popkin v. Bishop*¹⁷⁹ was proper? If so, the standard articulated in the instant decisions is soon likely to be either discarded or adulterated by that court if it escapes review by the Supreme Court.

Moreover, in the event the Supreme Court eventually makes the final determination in these cases,¹⁸⁰ it is questionable whether their expansive import will survive.¹⁸¹ In this connection, strictness of view in

¹⁷⁵ See also text accompanying notes 27 & 28 *supra*.

¹⁷⁶ *Green v. Santa Fe Indus., Inc.*, 533 F.2d 1309 (2d Cir. 1976).

¹⁷⁷ *Id.* at 1310.

¹⁷⁸ See *id.*

¹⁷⁹ 464 F.2d 714 (2d Cir. 1972). In *Popkin* the court inappropriately ignored all but the alternative finding of deception in *Schoenbaum*. *Id.* at 719. Since there was concededly no deception in the *Green* and *Marshel* decisions, they a fortiori overrule *Popkin* as requiring deception as an element. See notes 126 through 151 and accompanying text *supra*.

¹⁸⁰ The per curiam opinion "[s]ped] these cases on their way to the Supreme Court as an exercise of sound, prudent, and resourceful judicial administration." 533 F.2d at 1310. However, that body historically has shown a generous propensity not to consider the circuit courts' decisions in 10b-5 cases. See, e.g., *Schlick v. Penn-Dixie Cement Corp.*, 507 F.2d 374 (2d Cir. 1974), *cert. denied*, 421 U.S. 976 (1976); *Bryan v. Block & Blevins Co.*, 490 F.2d 563 (5th Cir.), *cert. denied*, 419 U.S. 844 (1974) (applying Georgia law); *Schoenbaum v. Firstbrook*, 405 F.2d 215 (2d Cir. 1968) (en banc), *cert. denied*, 395 U.S. 906 (1969); *Vine v. Beneficial Fin. Co.*, 374 F.2d 627 (2d Cir.), *cert. denied*, 389 U.S. 970 (1967); *Birnbaum v. Newport Steel Corp.*, 193 F.2d 461 (2d Cir.), *cert. denied*, 343 U.S. 956 (1952).

¹⁸¹ *Cf. Ernst & Ernst v. Hochfelder*, 96 S. Ct. 1375 (1976) (holding no private cause of

reversing these cases could even undermine *Schoenbaum's* controlling influence standard. Such an upshot might render nugatory the gradual awakening over a period of 25 years that the Rule was properly designed to reach more than those transactions which involve the technical elements of common law fraud or deception.¹⁸² The irony would be complete if the reemphasis of these elements occurred in the context of going private litigation, where deception is, in fact, irrelevant vis-à-vis the inequity of being frozen out even though there is a brazen disclosure of the insider's desire to eliminate the minority.¹⁸³

In order to prevent such an undesirable retreat, the authors strongly advocate adherence to the *Schoenbaum* controlling influence standard. The Second Circuit, as well as other circuits and the Supreme Court, could certainly build upon this standard a legal theory capable of realistic application to the wide variety of unfair security transactions.

David Palmer Jaqua
Dan W. Webb

action under Rule 10b-5 without an allegation of common law scienter); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975).

¹⁸² See note 56 *supra*.

¹⁸³ See notes 32 through 34 *supra*. Professor Vorenberg was of the opinion that there are still sound reasons to allow a stockholder to retain his status until something more than the majority's desire to be rid of him or to own his shares justifies his elimination. Vorenberg, *supra* note 18, at 1201.

RECENT DECISIONS

CONSTITUTIONAL LAW—STATE ACTION—NOMINAL LEASE OF MUNICIPAL LAND, COUPLED WITH NONENFORCEMENT OF CITY ORDINANCES PROHIBITING RACIAL AND RELIGIOUS DISCRIMINATION, NOT SUFFICIENT TO IMPLICATE THE STATE

Having been denied membership in the Biscayne Bay Yacht Club, plaintiffs¹ notified the city of Miami that the club's membership policies violated city ordinances² which expressly prohibited religious and racial discrimination by public lessees. When the city failed to enforce the ordinance, plaintiffs sought injunctive relief³ against the club⁴ under section 1983.⁵ Plaintiffs contended that

¹ Plaintiffs Harry Golden and David Fincher are members of Jewish and black minorities, respectively.

² MIAMI, FLA., CODE § 38-9, *quoted in* Golden v. Biscayne Bay Yacht Club, 530 F.2d 16, 27 (5th Cir. 1976), provides:

"Section 1. That the lessee of any property of which the City of Miami is the owner shall not discriminate against or refuse or deny to any person or persons, guests or permittees, the use of the facilities leased from the City because of race, creed, religion, color or national origin.

. . . .
Section 3 [S]aid provisions are to be considered a part of every such lease as described above entered into between the City of Miami and any person, firm, corporation, club or organization, regardless of the specific written terms of any lease now existing or to be entered into in the future."

Plaintiffs also contended that the leasing violated the terms of the deed under which the city held title. The city's title to the property was conditioned on the land being used solely for *public* purposes. The lease to the club was effectuated only after the city's grantor, who believed the lease would "help relieve the accute [*sic*] shortage of *public* dock facilities," waived the condition. Golden v. Biscayne Bay Yacht Club, 370 F.Supp. 1038, 1040 (S.D. Fla. 1973), *aff'd*, 521 F.2d 344 (5th Cir. 1975), *rev'd on rehearing en banc*, 530 F.2d 16 (5th Cir. 1976). The waiver was granted with the reservation that the city could cancel the lease if the land was used in a manner "inimical to the general public interest!" 530 F.2d at 26 n.8.

³ The initial complaint requested both declaratory and injunctive relief but the district court and all appellate action proceeded only on the issue of injunctive relief. 370 F. Supp. at 1041.

⁴ The city of Miami was also originally named as a defendant, but the district court ruled that the city could not be sued under section 1983. 370 F. Supp. at 1044, *citing* City of Kenosha v. Bruno, 412 U.S. 507 (1973), which held that a city was not a "person" for purposes of equitable relief under section 1983. *See generally* McCormick, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Protections, Part I*, 60 VA. L. REV. 1, 28 (1974).

⁵ 42 U.S.C. § 1983 (1970) provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

the city's leasing of valuable bay bottom land to the club for a nominal sum,⁶ combined with the city's refusal to enforce the anti-discrimination ordinances, constituted sufficient governmental involvement to bring the discriminatory conduct within the "color of state law" requirement of section 1983.⁷ Defendant, a private club,⁸ contended that a good faith leasing of city-owned property, even for a nominal sum, was not a sufficient nexus to activate section 1983. The district court, finding the club cloaked with the "color of state law," held that the membership policies violated the strictures of the fourteenth amendment and ordered the club to cease its religious and racial discrimination.⁹ With one judge dissenting, a three-judge panel of the United States Court of Appeals for the Fifth Circuit affirmed the lower court's decision.¹⁰ On rehearing en banc, *held*, reversed and remanded with directions to dismiss the complaint. Where the sole nexus between a municipality and a private club is the municipality's \$1 per year lease of valuable bay bottom land to the club, the "color of state law" requirement of section 1983 is not met. *Golden v. Biscayne Bay Yacht Club*, 530 F.2d 16 (5th Cir.), *certiorari denied*, 45 U.S.L.W. 3255 (U.S. Oct. 5, 1976) (No. 76-28).

The *Civil Rights Cases*¹¹ first adumbrated the state-private action dichotomy. Determining that private discrimination was beyond the scope of the fourteenth amendment, Justice Bradley's majority opinion stated: "It is State action of a particular character that is prohibited [by the fourteenth amendment]. Individual invasion of individual rights is not the subject matter of the amendment."¹² With purely private discrimination removed from the operation of the equal protection clause,¹³ the courts began to search for indicia of the

The district court based its holding on the combined application of *id.* §§ 1981, 1983, & 2000a. The three judge panel and the en banc court of appeals, however, decided only the section 1983 issue. 530 F.2d at 17 n.1.

Section 1983 was originally enacted as section 1 of the Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 12 (1871). For an excellent discussion of the statute's legislative origin, see *Monroe v. Pape*, 365 U.S. 167, 172-87 (1961). The jurisdictional base for section 1983 is 28 U.S.C. § 1343(3) (1970).

⁶ The terms of the lease granted the club exclusive use of the leased waterbottoms for a \$1 annual rental. 530 F.2d at 20.

⁷ "State action" and "color of law" will be used interchangeably to refer to the requirement of the fourteenth amendment which states: "No State . . . shall . . . deny to any person . . . the equal protection of the laws." U.S. CONSR. amend. XIV, § 1 (emphasis added).

⁸ The club was found to be genuinely private and "not formed as a subterfuge to evade the civil rights laws." 370 F. Supp. at 1041.

⁹ *Id.* at 1042-44. Although finding no de jure discrimination, the court concluded that de facto discrimination existed because the club was unable to state whether it had ever had a black or a Jewish member in its 86 year history, despite the fact that at least one-fourth of the local population was black or Jewish. *Id.* at 1043. The court further concluded that the lease above was sufficient to establish the color of law requirement. *Id.* at 1042.

¹⁰ *Golden v. Biscayne Bay Yacht Club*, 521 F.2d 344 (5th Cir. 1975), *noted in* 54 TEXAS L. REV. 641 (1976).

¹¹ 109 U.S. 3 (1883).

¹² *Id.* at 11.

¹³ The exclusion of purely private discrimination is still recognized today. See *Moose*

"state." Though subsequent decisions have not developed a uniform test,¹⁴ two distinct systems of analysis have emerged—the public function approach and the nexus approach. The public function approach, first developed in the election context¹⁵ and later extended to a private lessee's operation of municipal facilities,¹⁶ maintains that when a state delegates the performance of a typical governmental function to a private entity, the entity's performance of the function is cloaked with the aura of the state and thus discharged under color of law.¹⁷ *Marsh v. Alabama*,¹⁸ involving the prosecution of Jehovah's Witnesses for refusing to leave the sidewalk of a company-owned town, was a major source of the public function approach and the derivative view that competing constitutional rights, such as the freedom of speech and property ownership, must be balanced to determine their relative importance.¹⁹ Though still viable, the pub-

Lodge No. 107 v. Irvis, 407 U.S. 163, 179-83 (1972) (Douglas, J., dissenting).

The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates may be. The individual can be as selective as he desires.

Id. at 179-80.

¹⁴ See *Reitman v. Mulkey*, 387 U.S. 369, 378 (1967) ("This Court has never attempted the 'impossible task' of formulating an infallible test for determining whether the State . . . has become significantly involved in private discrimination.").

¹⁵ *Terry v. Adams*, 345 U.S. 461 (1953); see *Smith v. Allwright*, 321 U.S. 649 (1944).

¹⁶ See, e.g., *Goodloe v. Davis*, 514 F.2d 1274 (5th Cir. 1975) (recreational facilities); *Cason v. City of Jacksonville*, 497 F.2d 949 (5th Cir. 1974) (auditorium); *Smith v. YMCA*, 462 F.2d 634 (5th Cir. 1972) (recreational facilities); *Wimblish v. Pinellas County*, 342 F.2d 804 (5th Cir. 1965) (golf course); *Hampton v. City of Jacksonville*, 304 F.2d 320 (5th Cir.), *cert. denied*, 371 U.S. 911 (1962) (golf course); *Derrington v. Plummer*, 240 F.2d 922 (5th Cir. 1956), *cert. denied*, 353 U.S. 924 (1957) (courthouse facilities); *Smith v. City of Birmingham*, 226 F. Supp. 838 (N.D. Ala. 1963) (airport facilities); *Adams v. City of New Orleans*, 208 F. Supp. 427 (E.D. La. 1962), *aff'd per curiam*, 321 F.2d 493 (5th Cir. 1963) (airport facilities). See also *Smith v. City of Birmingham*, 226 F. Supp. 838, 841 n.4 (N.D. Ala. 1963) (collecting cases); Note, *Constitutional Restrictions on a Lessee of Public Property*, 42 VA. L. REV. 647 (1956).

¹⁷ See, e.g., *Parish v. NCAA*, 506 F.2d 1028, 1033 (5th Cir. 1975) (Since the government would "fill the void" if the NCAA were to disappear, the latter's actions were under color of law.); *Player v. Alabama Dep't of Pensions & Security*, 400 F. Supp. 249, 262 (M.D. Ala. 1975) (Performance of an essential government function "cloaks" the private entity with the the "aura of the state.").

¹⁸ 326 U.S. 501 (1946).

¹⁹ Justice Black's majority opinion stated:

When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position.

Id. at 509.

This raises the question whether courts have employed a different standard for state action if racial discrimination is the gravamen of the complaint. In *Jackson v. Statler Foundation*, 496 F.2d 623, 628 (2d Cir. 1974), *cert. denied*, 420 U.S. 927 (1975), the court stated:

lic function premise has been qualified by recent decisions.²⁰ The nexus test, exemplified by *Burton v. Wilmington Parking Authority*,²¹ attempts to identify points of contact between the private entity and the state. In *Burton*, the Wilmington Parking Authority, an agency of the State of Delaware, constructed a public parking facility and, to insure its financial success, entered into long-term leases with commercial tenants, including the Eagle Coffee Shoppe. *Burton*, a Black, was refused service in the coffee shop and sued for injunctive relief. The coffee shop contended that as a private establishment its activities were not subject to equal protection mandates. The Court, however, concluded that the financial interdependence between Eagle and the Authority made them joint participants in the discrimination.²² Thus, Eagle's seemingly private conduct was within the scope of the fourteenth amendment.²³ The *Burton* majority further reasoned that the Authority's "inaction" in preventing dis-

Where racial discrimination is involved, the courts have found "state action" to exist; where other constitutional claims are at issue [due process, freedom of speech], the courts have generally concluded that no "state action" has occurred.

In *O'Neill v. Grayson County War Memorial Hosp.*, 472 F.2d 1140, 1143-44 n.3 (6th Cir. 1973), a somewhat different sentiment was expressed:

We find nothing in the language of that statute nor in the Supreme Court's decisions thereunder which permits the recognition or nonrecognition of state action to be in any way governed by the nature of the Constitutional rights asserted in a complaint under Section 1983.

See also Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656, 661 (1974); Note, *State Action and the Burger Court*, 60 VA. L. REV. 840, 858-62 (1974).

²⁰ See *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), where the Court discussed the applicability of the public function approach to a public utility and indicated the test is whether the power exercised is one "traditionally associated with sovereignty." *Id.* at 353. See also *Powe v. Miles*, 407 F.2d 73 (2d Cir. 1968), where the court said the public function theory applied only to services which are "so clearly governmental in nature that the state cannot be permitted to escape responsibility by allowing them to be managed by a supposed private agency." *Id.* at 80.

²¹ 365 U.S. 715 (1961). For a discussion of this case see Lewis, *Burton v. Wilmington Parking Authority—A Case Without Precedent*, 61 COLUM. L. REV. 1458 (1961).

²² The Court realized the difficulty in determining when private action becomes state action and advocated the use of an ad hoc approach: "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." 365 U.S. at 722. This ad hoc approach has been recognized by nearly all the courts of appeals. See *Cohen v. Illinois Institute of Technology*, 524 F.2d 818 (7th Cir. 1975); *Jackson v. Statler Foundation*, 496 F.2d 623 (2d Cir. 1974), *cert. denied*, 420 U.S. 927 (1975); *Adams v. Southern Cal. First Nat'l Bank*, 492 F.2d 324 (9th Cir. 1974); *Weigand v. Afton View Apartments*, 473 F.2d 545 (8th Cir. 1973); *O'Neill v. Grayson County War Memorial Hosp.*, 472 F.2d 1140 (6th Cir. 1973); *Pennsylvania v. Brown*, 392 F.2d 120 (3d Cir.), *cert. denied*, 391 U.S. 921 (1968); *Simkins v. Moses H. Cone Memorial Hosp.*, 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964); *Baldwin v. Morgan*, 251 F.2d 780 (5th Cir. 1958).

²³ 365 U.S. at 725.

crimination by its lessee was tantamount to state action.²⁴ The Authority, as an agent of the state, had an affirmative duty to eradicate discrimination, and its failure to require the coffee shop to formulate its policies accordingly amounted to an intolerable abdication of that responsibility. With the advent of *Burton*, the state "inaction" concept²⁵ became instrumental in efforts to effectuate desegregation and in furthering what appeared to be a relaxation of the state action requirement.²⁶ *Reitman v. Mulkey*,²⁷ the pinnacle of the relaxant trend, found state action in California's attempt to incorporate the right of private discrimination into its constitution. The Court held that the proposed amendment carried only a pretense of neutrality and that, in actuality, it sanctioned discrimination as a basic state policy.²⁸ Although commentators immediately proclaimed the demise of the state action requirement,²⁹ it survived under the

²⁴ [N]o State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be. . . . By its inaction . . . the State, has not only made itself a party to the refusal of service, but has elected to place its power, property, and prestige behind the admitted discrimination.

Id.

The state "inaction" theory was extracted from prior cases which held that the duty and power of the states to create and enforce property interests must be exercised within the boundaries defined by the fourteenth amendment. See *Shelley v. Kraemer*, 334 U.S. 1 (1947); *Marsh v. Alabama*, 326 U.S. 501 (1946). See also *Henkin*, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473, 483-85 (1962).

²⁵ See *Bell v. Maryland*, 378 U.S. 226, 310-11 (1964) (Goldberg, J., concurring) ("[S]tate conduct which might be described as 'inaction' can nevertheless constitute responsible 'state action' within meaning of the Fourteenth Amendment."); *Jennings v. Patterson*, 488 F.2d 436 (5th Cir. 1974) (state's failure to remove barricade blocking a public street found to be state action). See also, *Bassett*, *The Reemergence of the "State Action" Requirement in Race Relations Cases*, 22 CATHOLIC U.L. REV. 39, 70-72 (1972); Note, *State Action and the Burger Court*, 60 VA. L. REV. 840, 849-51 (1974). But see *Lucas v. Wisconsin Elec. Power Co.*, 466 F.2d 638, 647 (7th Cir. 1972), cert. denied, 409 U.S. 1114 (1973); *Powe v. Miles*, 407 F.2d 73, 81 (2d Cir. 1968); *Ingram v. Dunn*, 383 F. Supp. 1043, 1046 (N.D. Ga. 1974), aff'd mem., 514 F.2d 1970 (5th Cir. 1975); *Seidenberg v. McSorley's Old Ale House, Inc.*, 317 F. Supp. 593, 597 (S.D.N.Y. 1970).

²⁶ See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (struck state action requirement for complaint under 42 U.S.C. § 1982); *Robinson v. Florida*, 378 U.S. 153 (1964) (equal protection challenge grounded on segregative health regulation); *Griffin v. Maryland*, 378 U.S. 130 (1964) (state action based on deputizing of amusement park security guard); *Lombard v. Louisiana*, 373 U.S. 267 (1963) (application of equal protection grounded on enforcement of state trespass laws).

²⁷ 387 U.S. 369 (1967). For a discussion of this case, see *Black*, *The Supreme Court, 1966 Term—Forward: "State Action," Equal Protection, and California's Proposition 13*, 81 HARV. L. REV. 69 (1971).

²⁸ 387 U.S. at 381.

²⁹ E.g., *Karst & Horowitz*, *Reitman v. Mulkey: A Telophase of Substantive Equal Protection*, 1967 SUP. CT. REV. 39; *Selard*, *A Constitutional Forecast: Demise of the "State Action" Limit on the Equal Protection Guarantee*, 66 COLUM. L. REV. 855 (1966); *Williams*, *The Twilight of State Action*, 41 TEXAS L. REV. 347 (1963).

direction of new Supreme Court appointees.³⁰ In *Moose Lodge No. 107 v. Irvis*,³¹ plaintiff, a black guest of a lodge member, was denied service at a fraternal club which held a state liquor license. The Court, per Mr. Justice Rehnquist, held that rigid state regulation of liquor licensing was insufficient to implicate the state. The Court, finding that state contacts in the form of services—such as electricity, water, and police and fire protection—are ever increasing, reasoned that the time-honored distinction between state and private conduct would be emasculated if state contiguity, regardless of kind, constituted significant state involvement.³² The Court's express desire to save the public-private distinction also served as a basis for distinguishing *Burton*. Emphasizing the absence of the symbiotic relationship between lessor and lessee which had existed in *Burton*, Mr. Justice Rehnquist asserted that the crucial distinction was that "while Eagle [the restaurant in *Burton*] was a public restaurant in a public building, *Moose Lodge* [was] a private social club in a private building."³³ The *Moose Lodge* decision clearly indicated that state involvement in private discrimination was not totally forbidden. The method of determining the tolerable degree of state involvement, however, was not so apparent. As the lower courts wrestled with the problem, new standards, such as organizational nature,³⁴ operational control,³⁵ and surplusage,³⁶ emerged. Two subsequent Supreme Court decisions did little to resolve the growing confusion. In the first, *Norwood v. Harrison*,³⁷ a Mississippi program of loaning textbooks to private schools was found unconstitutional as fostering segregation even though the program had been operating long before the advent of court-ordered integration. The Court generalized that "[a] State's constitutional obligation requires it to steer clear . . . of giving significant aid to institutions that practice racial or other invidious discrimina-

³⁰ See Bassett, *supra* note 25, at 40; Note, *supra* note 25, at 863.

³¹ 407 U.S. 163 (1972).

³² *Id.* at 173.

³³ *Id.* at 175. The assertion was based on the factual determination that the mutual benefits exchanged by Eagle and the parking authority were greater than those gained by the liquor board and Moose Lodge.

³⁴ See *Bennett v. Dyer's Chop House, Inc.*, 350 F. Supp. 153 (N.D. Ohio 1972) (*Moose Lodge* distinguished as applying only to private clubs while a profitmaking enterprise open to the public and licensed by the state was covered by section 1983).

³⁵ See, e.g., *Wahba v. New York Univ.*, 492 F.2d 96 (2d Cir.), *cert. denied*, 419 U.S. 874 (1974) (no finding of state action despite total government funding of challenged project because University maintained operational control); *Hollenbaugh v. Board of Trustees*, 405 F. Supp. 629 (W.D. Pa. 1975) (15 of the 24 directors were appointed by local government agencies, yet no finding of state action because the appointees served in a private capacity and not under governmental control).

³⁶ See, e.g., *Derrington v. Plummer*, 240 F.2d 922, 925 (5th Cir. 1956), *cert. denied*, 353 U.S. 924 (1957) ("[A county] may lease for private purposes property not used nor needed for county purposes, and the lessee's conduct in operating the leasehold would be merely that of a private person."); *Coke v. City of Atlanta*, 184 F. Supp. 579 (N.D. Ga. 1960) (state action existed in private operation of city's airport restaurant because property was not surplus).

³⁷ 413 U.S. 455 (1973).

tion.”³⁸ What constituted “significant aid,” however, remained nebulous.³⁹ The second decision, *Gilmore v. City of Montgomery*,⁴⁰ involving a challenge to the use of city facilities by segregated schools and organizations, turned on the exclusivity of private control. The Court spurned exclusive discriminatory use⁴¹ but found nonexclusive use not to be unconstitutional per se.⁴² The most recent Supreme Court decision construing the state action requirement, *Jackson v. Metropolitan Edison Co.*,⁴³ involved a due process challenge to the termination of plaintiff’s electrical service by a Pennsylvania public utility. Adding a new dimension to the state action requirement, the *Jackson* Court emphasized that state action required not only a close nexus between the state and the challenged entity but also “a sufficiently close nexus between the State and the *challenged action* of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.”⁴⁴ Applying *Burton*, *Moose Lodge*, and *Jackson*, the Fifth Circuit, in *Greco v. Orange Memorial Hospital Corp.*,⁴⁵ found no state action where a private hospital which prohibited abortion was operated in a building leased from the county for \$1 per year. The court concluded that

³⁸ *Id.* at 467 (emphasis added).

³⁹ The standard seemed to vary with the type of challenged institution.

Private hospitals: *Greco v. Orange Memorial Hosp. Corp.*, 513 F.2d 873 (5th Cir.), *cert. denied*, 423 U.S. 1000 (1975) (no state action found despite token rental lease and extensive operational guidelines); *Spenser v. Community Hosp.*, 393 F. Supp. 1072 (N.D. Ill. 1975) (no state action despite receipt of public funds for construction and operation). *But see* *Simkins v. Moses H. Cone Memorial Hosp.*, 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964) (receipt of Hill-Burton funds sufficient to constitute state action).

Private universities: *Browns v. Mitchell*, 409 F.2d 593 (10th Cir. 1969) (no state action despite tax exemption on both education and noneducation income-producing property); *Grossner v. Trustees of Columbia Univ.*, 287 F. Supp. 535 (S.D. N.Y. 1968) (no state action despite 40 percent funding from governmental sources).

Private segregated schools: *Norwood v. Harrison*, 413 U.S. 455 (1973) (state action based on loan of text books); *United States v. Mississippi*, 499 F.2d 425 (5th Cir. 1974) (sublease of city building to private academy sufficient to meet state action requirement); *Poindexter v. Louisiana Financial Assistance Comm’n*, 275 F. Supp. 833 (E.D. La. 1967), *aff’d per curiam*, 389 U.S. 571 (1968) (state tuitional grants constituted state action).

⁴⁰ 417 U.S. 556 (1974).

⁴¹ *Id.* at 569.

⁴² *Id.* at 574.

⁴³ 419 U.S. 345 (1974).

⁴⁴ *Id.* at 351 (emphasis added), *citing* *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 176 (1972); *see* *Cohen v. Illinois Institute of Technology*, 524 F.2d 818 (7th Cir. 1975) (despite government chartering, regulation, and subsidies, no state action found in sex discrimination because the state was not involved in the discriminatory practices); *New York Jaycees, Inc. v. United States Jaycees, Inc.*, 512 F.2d 856 (2d Cir. 1975) (substantial government funding and tax exempt status but no state action because government not involved in formulation of challenged activity); *Powe v. Miles*, 407 F.2d 73, 81 (2d Cir. 1968) (“[T]he state must be involved not simply with some activity of the institution alleged to have inflicted the injury upon the plaintiff but with the activity that caused the injury.”).

⁴⁵ 513 F.2d 873 (5th Cir.), *cert. denied*, 423 U.S. 1000 (1975).

this lease situation did not constitute significant aid; since the county had neither interfered with nor sought to influence the hospital's abortion policy, the required nexus between the county and this policy was lacking.⁴⁶

In the instant case, the court, confronted with a predicament converging the factors of existing authority, adopted a strict application of the nexus approach by aligning the *Burton* and *Moose Lodge* decisions as factual examples of the degree of state insinuation required for section 1983 application. The majority opinion stated that since the contacts did not approach the symbiotic relationship found in *Burton* and were even less substantial than those ruled insufficient in *Moose Lodge*, the instant situation did not constitute significant state involvement.⁴⁷ In assessing the weight of the contacts, the majority opinion acknowledged *Burton's* balancing test of "sifting facts and weighing circumstances"⁴⁸ but preferred the recent, conservative applications in *Moose Lodge*, *Jackson*, and *Greco*.⁴⁹ Apparently emphasizing the similarities of the state contacts in *Greco* and the instant case, the court pointed out that *Greco's* holding of no state action was predicated on the lack of any direct or indirect state participation in formulating the challenged policy.⁵⁰ Aided by the broad principle of *Jackson* and the close similarity of the *Greco* reasoning, the court concluded that since the state must be involved with the challenged action of the private entity, and since, in the instant case, the trial court had found that the city of Miami was completely divorced from the club's membership policies, the nexus between the city and the club's challenged activities was insufficient to demonstrate significant state involvement.⁵¹

A lengthy dissent, authored by Chief Judge Brown, stated that since the court failed to consider all the relevant issues, the majority opinion should not be read as a barrier to finding state action under similar circumstances in the future.⁵² Judge Brown reasoned that since the city granted exclusive use of the bay bottom⁵³ but refused to enforce the municipal ordinances' strict proscription

⁴⁶ 513 F.2d at 880.

⁴⁷ *Golden v. Biscayne Bay Yacht Club*, 530 F.2d 16, 22-23 (5th Cir. 1976).

⁴⁸ *Id.* at 22.

⁴⁹ 513 F.2d 873 (5th Cir.), *cert. denied*, 423 U.S. 1000 (1975) (no state action found in publicly owned, privately operated, hospital's refusal to perform elective abortions). *But see* *Golden v. Biscayne Bay Yacht Club*, 530 F.2d 16, 33 (5th Cir. 1976) (Brown, C.J., dissenting) (*Greco* distinguished because, first, it did not involve racial discrimination and therefore was judged by a different state action standard and, second, the *Greco* lease did not prohibit the challenged activity—elective abortions—while the restrictions attached to the *Golden* lease did prohibit discrimination.).

⁵⁰ 530 F.2d at 20. The majority determined that, except for the lease, Miami "has never participated in or been involved in the" club's operation; therefore consideration of corollary issues such as the city ordinances' application to bay bottom lessees and the subsidizing effect of the token rental payments was precluded. *Id.* at 22-23.

⁵¹ *Id.* at 22. The court might also have been concerned about the effect on the case load of finding every public lease to constitute state action. *Cf. Golden v. Biscayne Bay Yacht Club*, 521 F.2d 344, 356 (5th Cir. 1975) (panel) (Coleman, J., dissenting).

⁵² 530 F.2d at 33-34 (Brown, C.J., dissenting).

⁵³ Judge Brown felt that the exclusivity of control granted the club in the instant case made *Gilmore v. City of Montgomery*, 417 U.S. 556 (1974), controlling. The dissent found

of racial and religious discrimination and refused to terminate the lease as being violative of the public interest,⁵⁴ sufficient state action existed in the city's "inaction."⁵⁵ The dissenting opinion further concluded that the token rental amounted to a fair market value lease coupled with a large annual city subsidy.⁵⁶ Thus, significant involvement existed under the state aid theory. Judge Brown also found application of the public function approach viable since the city had originally leased the land for the avowed "public purpose" of relieving overcrowded public docks⁵⁷ and since the incorporative provisions of the ordinances burdened the club with the enforcement of the city anti-discrimination policy. The dissent did not decide whether the contacts, taken separately, would be sufficient to constitute state action but asserted that the cumulative state insinuation was clearly within *Burton's* "significant state involvement" requirement.⁵⁸

Though confronted with a *Moose Lodge* private club leasing *Burton* public property for a *Gilmore* exclusive use during a *Burton* public crisis, coupled with a *Jackson* lack of direct state involvement in the challenged activity, the majority opinion failed to undertake a correspondingly comprehensive analysis. Instead, the court reverted to *Burton's* mechanistic comparison of contacts in the restricted context of the district court's decision. Moreover, the court failed to address the issues created by the exclusive use for nominal rent under the aid theory and the applicability of the ordinances as state inaction indicia.⁵⁹ No single case has combined the particular aid and inaction problems presented in *Golden*; therefore, resolution of those issues depends on their individual evaluations. Scrutiny of section 1983 cases reveals that neither aid nor inaction has individually sustained a conclusion of state action. The Fifth Circuit has recently rejected the premise that token rentals amount to state subsidies.⁶⁰ The

Gilmore's emphasis on *Montgomery's* affirmative duty to refrain from any activity contravening a school desegregation order to be parallel to Miami's obligation to prevent the use of city lands in a manner contrary to the nondiscriminatory directives of the city ordinances. 530 F.2d at 31-32.

⁵⁴ See note 2 and accompanying text *supra*.

⁵⁵ 530 F.2d at 30-31, citing *Jennings v. Patterson*, 488 F.2d 436 (5th Cir. 1974) (city's refusal to remove privately erected barricade of public street constituted state action). See note 25 and accompanying text *supra*.

⁵⁶ 530 F.2d at 33.

⁵⁷ *Id.*

⁵⁸ *Id.* at 33-34. The dissent distinguished *Moose Lodge* as being significantly different because it involved the rights of guests, not those of persons seeking membership. *Id.* at 29 n.15, citing *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 170-71 (1972).

⁵⁹ *Golden v. Biscayne Bay Yacht Club*, 530 F.2d 16, 17-18, 22-23 (5th Cir. 1976). Apparently unable to distinguish *Moose Lodge* on its merits, the dissent used a factual difference as the basis for summarily dismissing the Supreme Court's position on private clubs. 530 F.2d at 29 n.15. The opinion also dealt with *Jackson* by stating without explanation that its requirements had been met. *Id.* at 29. Later, however, the dissent agreed that the situation in *Golden* was not a "complete parallel" with *Jackson*. *Id.*

⁶⁰ *Greco v. Orange Memorial Hosp. Corp.*, 513 F.2d 873 (5th Cir.), cert. denied, 423 U.S. 1000 (1975); *Soloman v. Miami Woman's Club*, 359 F. Supp. 41 (S.D. Fla. 1973).

state inaction argument, weakened by a recent Supreme Court decision,⁶¹ has been criticized as leading to the obliteration of the century-old distinction between private and governmental action because the states have the power to proscribe any form of discriminatory private conduct.⁶² The fact remains, however, that the presence of both aid and inaction could significantly alter the "weighing" process. The majority's sequential comparison of contacts indicates the Fifth Circuit's continued adherence to the case-by-case approach of "sifting facts and weighing circumstances."⁶³ Applying this approach in the instant decision, the Fifth Circuit seems to adopt the interdependence and symbiosis found in the multitudinous contacts of *Burton* as the minimum standard of section 1983 applicability when a private entity is the challenged party.⁶⁴ Contending instead that the state action requirement is generally relaxed when the challenged activity is racial discrimination, many authorities have questioned the universal applicability of such a standard.⁶⁵ A relaxed standard, however, has been recognized only when two factors were present: The challenged activity was racially discriminatory, and the challenged entity was the state.⁶⁶ Consequently, when a private organization is charged with racial discrimination, courts have not only refused to relax the state insinuation standard but have also required significant state involvement in both the challenged organization

⁶¹ See *Rizzo v. Goode*, 423 U.S. 362, 375-76 (1976) (district court finding that inaction is indistinguishable from a "pervasive pattern of intimidation" not in accord with Congressional intent in enacting section 1983).

⁶² See 54 TEXAS L. REV. 641, 645 n.19 (1976).

⁶³ Though criticized as spawning inconsistency and praised as the only means of doing justice to all, this approach remains one of the rare absolutes in state action analysis. Compare *Lewis*, *supra* note 21, at 1466 (author suggests that by adopting such a particularistic approach the Court decides a case without setting a precedent), and *Van Alstyne & Karst, State Action*, 14 STAN. L. REV. 3, 57 (1961) (commends the caution evidenced by a case-by-case formula but adds that "it is galling to those who yearn for certainty in their constitutional law"), with *Note, supra* note 25, at 863 (*Burton* approach praised as only means of doing justice to all).

⁶⁴ Cf. *Golden v. Biscayne Bay Yacht Club*, 530 F.2d 16, 22 (5th Cir. 1976). The majority opinion posited the *Burton* factual situation as the example of significant state involvement. The court concluded that the contacts in *Golden* were less substantial than those in *Burton* and, therefore, no state action existed. *Burton* was thus applied as the minimum standard. The Fifth Circuit has previously employed the same standard in finding significant state involvement, see *Smith v. YMCA*, 462 F.2d 634, 647 (5th Cir. 1972); *Adams v. Miami Police Benevolent Ass'n*, 454 F.2d 1315, 1318 (5th Cir. 1972), *cert. denied*, 409 U.S. 843 (1973), and in failing to find it, see *Greco v. Orange Memorial Hosp. Corp.*, 513 F.2d 873, 877-78 (5th Cir.), *cert. denied*, 423 U.S. 1000 (1975); *Soloman v. Miami Woman's Club*, 359 F. Supp. 41, 45-46 (S.D. Fla. 1973).

⁶⁵ See, e.g., *Note, State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656, 657 (1974); *Note, State Action and the Burger Court*, 60 VA. L. REV. 840, 859 (1974).

⁶⁶ See, e.g., *Gilmore v. City of Montgomery*, 417 U.S. 556 (1974) (city as defendant); *Norwood v. Harrison*, 413 U.S. 455 (1973) (county as defendant). The assertion was dictum in other major cases cited for the same proposition. See *James v. Pinnix*, 495 F.2d 206, 208 (5th Cir. 1974); *Powe v. Miles*, 407 F.2d 73, 82 (2d Cir. 1968).

and the challenged activity.⁶⁷ The *Golden* court's strict adherence to both of these standards inevitably compelled a balancing of the club's privacy and associational rights⁶⁸ against the plaintiffs' equal protection and personal dignity guarantees, tempered by possible alternatives and the implications of finding state action.⁶⁹ Although the court's general disdain for racial discrimination⁷⁰ would aid the plaintiffs' cause, the public's probable lack of awareness of the bay floor's public ownership or of any contact tying the club to the city would diminish the policy base for application of the aid and inaction theories.⁷¹ Therefore, the club was in a stronger position to assert its rights as a private club.⁷² However a court chooses to weigh these considerations, evaluation of the particular fact situation would help explain a finding of no state action in cases like *Golden* where the contacts seemingly justify an opposite result. *Golden*'s true significance, however, lies in its refusal to expand the bounds of state action. Judge Coleman, dissenting in the panel opinion and writing for the en banc majority, emphasized the implications of treating a mere lease as significant state involvement. To so hold would have brought all private dock owners on Biscayne Bay as well as the multifarious lessees of such publicly owned domains as the Gulf of Mexico waterbottoms and Sixteenth Section school lands within the constraints of section 1983.⁷³ Private citizens, connected

⁶⁷ See notes 43 & 44 and accompanying text *supra*.

⁶⁸ A close examination of the facts, however, makes one wonder if the club's privacy and association rights were truly issues. It is possible to maintain that freedom of association is not important in a club whose total membership is 250, yet allows three votes to blackball prospective members and refuses voting privileges altogether to junior members. *Golden v. Biscayne Bay Yacht Club*, 530 F.2d 16, 24 n.4 (5th Cir. 1976); see Comment, *Association, Privacy and the Private Club: The Constitutional Conflict*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 460, 469-70 (1970), where the author suggests that governmental intrusion in a very large social organization would not infringe upon the associational rights of members because as an organization increases in size the members lose their personal intimacy and are usually so casually acquainted that privacy and freedom of association are not important concerns.

⁶⁹ An additional factor is the judge's personal prejudices and constitutional preferences. See, Comment, *supra* note 68, at 460.

⁷⁰ See note 19 *supra*.

⁷¹ The policy basis of all state action cases is the fourteenth amendment's goal of eradicating racial discrimination in every instance where the government's presence is promoting it. The specific policies behind the aid and inaction theories reason that a private individual in control of public property should not be permitted to use it in ways that are prohibited to the government or in ways that would discredit the government. See Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656, 677 (1974).

⁷² The potential weight of these considerations was eloquently expressed by Justice Douglas:

My view of the First Amendment and the related guarantees of the Bill of Rights is that they create a zone of privacy which precludes government from interfering with private clubs or groups. The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 179-80 (1972) (Douglas, J., dissenting).

⁷³ *Golden v. Biscayne Bay Yacht Club*, 521 F.2d 344, 356 (1975) (panel) (Coleman, J., dissenting).

to the state by only a lease, would have been charged with governmental responsibility in a variety of activities which are recognized and treated as essentially "private." The goal of effectuating desegregation would thus cause the abolition of established distinctions between public and private activities. Yet, *Golden* reflects a portentous attitude. In the context of recent Supreme Court decisions⁷⁴ this case suggests a reluctance to continue the judicial crusade against racial prejudice. The general public, unsympathetic to what is considered unwarranted governmental intrusion in private affairs, would welcome such a move. Minorities, however, have good reason to complain: *Golden* could mark the Fifth Circuit's first step back toward an unpleasant past.⁷⁵

Richard G. Cowart
T. David Cowart

⁷⁴ After surveying recent state action decisions, the authors found that three Justices, Chief Justice Burger, Justice Powell, and Justice Rehnquist, prefer a strict, limited interpretation of state action. Three Justices, Blackmun, Stewart, and White, appear to slightly favor such a limited approach over a loose interpretation, while Justices Brennan and Marshall advocate a loose interpretation. Justice Stevens has not yet participated in a state action decision, but his opinion in *Cohen v. Illinois Institute of Technology*, 524 F.2d 818 (7th Cir. 1975), indicates that he will take a conservative position.

⁷⁵ See Black, *supra* note 27, at 75. Prior to *Golden*, the Fifth Circuit had a nine to six majority favoring a loose interpretation of state action. In the balloting for this en banc decision, four judges, Ainsworth, Morgan, Roney, and Thornberry, departed from their previous positions and voted against finding state action. Combined with the uncertainty of the appointee to replace the retired Judge Bell, there are now five court members whose stance cannot be reliably predicted, balanced with five members favoring a restricted application and five members favoring a loose interpretation.

BOOK REVIEWS

SIMPLE JUSTICE

BY RICHARD KLUGER

New York: Alfred A. Knopf, Inc., 1975.

Pp. 823. \$15.95.

Ben O. Weeks*

Following the 1954 decision of *Brown v. Board of Education*,¹ by the United States Supreme Court, *Time* magazine made the following comment:

In its 164 years the court had erected many a landmark of U.S. history. None of them except the Dred Scott Case (reversed by the Civil War) was more important than the school segregation issue. None of them directly affected so many American families.²

The events leading to the *Brown* decision are exhaustingly described in the book *Simple Justice*. This monumental work is not only of paramount importance to legal scholars working in the area of civil rights law, but also is a classic description and analysis of the black struggle for equality.

Simple Justice is divided into three parts. Part I is a historical perspective of statutes and court decisions relating to civil rights before the early 1950's. Prior to *Brown* the leading decision regarding segregation in the public schools was *Plessy v. Ferguson*,³ which established the "separate but equal" doctrine. Surprisingly, *Plessy* was not concerned with public education, but rather with racial separation on railway cars. Segregationists used this decision to defend the practice of separating the races in public schools.

The reader is given vivid portraits of black leaders who were instrumental in the struggle for equality during the first half of the twentieth century. Especially interesting are profiles of the black attorneys who initiated litigation to overturn the laws against segregation. Many of the key figures in the court battles, such as Thurgood Marshall, were graduates of Howard Law School in Washington, D.C. Significantly, the first inroads in the area of school desegregation were made at the college graduate level. By adopting the strategy of attacking segregated graduate instruction, N.A.A.C.P. strategists were able to win a number of cases prior to the *Brown* decision. The plaintiffs argued that black students were unable to receive an equal education because they were forced to attend out-of-state graduate schools or inferior black institutions. Southern and border states were to admit black students to previously all-white schools in lieu of establishing new graduate facilities for the handful of blacks that would eventually apply. The second alternative would have been prohibitive in cost; therefore, the segregation barrier initially fell at the graduate school level.

* Associate Professor of Business Law, State University of New York at Oswego.

¹ 347 U.S. 483 (1954).

² R. KLUGER, *SIMPLE JUSTICE* 709 (1975).

³ 163 U.S. 537 (1896).

Part II is a complete history of the five lower court cases which were eventually consolidated under the umbrella of *Brown*. Kluger describes in minute detail the path that each case followed to reach the Supreme Court. For example, one of the cases began when Barbara Johns, a black high school student in Prince Edward County, Virginia, led a student boycott to call attention to the unequal conditions of the school. This action prompted the N.A.A.C.P. attorneys to select Prince Edward County as one of the areas to challenge the "separate but equal" concept.

Interestingly, in the early cases, the N.A.A.C.P. used social science testimony to show that segregation was inherently unequal despite the amount of money actually spent on the schools. An example of this type of testimony was that given by Kenneth Clark, a then obscure assistant professor of social psychology at City College of New York. He tested a number of black children using dolls to determine the child's perception of himself as a Black. It was found that many of the black children preferred the white doll over the black doll. These results were interpreted to show a reduced degree of racial awareness that could be attributed to segregation.

Part III of *Simple Justice* deals primarily with the *Brown* decision. Perhaps, the key event in the drama leading to the school desegregation decision was the death of Chief Justice Fred M. Vinson and the subsequent Supreme Court appointment of Governor Earl Warren of California by President Eisenhower. After the first argument of *Brown*, and prior to Warren's appointment, the Court was strongly divided on the outcome of the case. The one thing that the nation did not need at that time was a sharply divided and indecisive Court. It was thought that if there were one or more dissents, the decision would be subject to greater criticism and that implementation would be more difficult. Chief Justice Warren was able to provide the necessary leadership which resulted in a unanimous Court. The landmark decision answered the following question in the affirmative:

Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal education opportunities?⁴

Two criticisms only slightly diminish the overall brilliance of *Simple Justice*. First, Kluger is often bogged down in copious background material. In describing the South Carolina locale where a major case was first initiated, the author states:

Six hundred square miles of gently rolling fields and pasture and woodland, mostly in gum trees and pine, the country lies dead center in a thirty-mile-wide plain that sweeps diagonally across the state on a northeast-southwest axis dividing the flat, marshy, tropical low country along the Atlantic coast from the sand hills farther inland and the more rugged Piedmont beyond them.⁵

⁴ *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

⁵ R. KLUGER, *supra* note 2, at 4.

Although this material is often interesting and certainly illustrates the author's competent research ability, perhaps some of the detail could have been edited in the interest of brevity. Second, although the author devotes 747 pages to *Brown* and the events leading up to the decision, he leaves only 29 pages for an epilogue describing events in the area of civil rights since 1954. Admittedly, *Simple Justice* is the story of *Brown*; however, the inclusion of more information on subsequent events, especially in the area of court-ordered busing, would have increased the book's intrinsic value.

Simple Justice is a landmark book written about a landmark decision. By combining the disciplines of law, sociology, and history, Kluger has produced a work of scholarship that is recommended reading for members of the legal profession and lay readers who wish to gain a better understanding of the American judicial process. Many Supreme Court decisions have little impact upon the average person. Decisions concerning public education, however, influence virtually every member of society. The public schools are required to play an increasingly larger role in preparing individuals to survive and to develop in this complex and technical age. Thus, one who understands the impact of *Brown*, will recognize the value of *Simple Justice*.

THE JUDGE
BY JAMES F. SIMON
New York: David McKay Company, Inc., 1976.
Pp. 209. \$8.95.

Guthrie T. Abbott*

The Judge presents a unique view into the workings of the criminal justice system as seen from the perspective of a criminal court judge. The reader will find spending a "week" with Judge James Barth to be an experience that is enjoyable as well as intellectually stimulating. The "week" described is one fashioned by the author from actual events observed by spending months with a criminal court judge in a city in the Northeastern part of the United States. As the reader looks over the shoulder of Judge Barth (a fictitious name used because of the delicate nature of many of the events discussed), he becomes involved in making the truly tough decisions that are a part of the fabric from which the criminal justice system in America is woven. The host of characters that Judge Barth encounters both inside and outside of the court room, forces the reader to consider (or to reconsider) many of the components of our judicial system. How far should a judge intrude into the arena of plea bargaining? Can or should anything be done to compensate for the disparate capabilities of opposing attorneys? What are the criteria to be used in determining sentences upon conviction? What method is most effective to voir dire the jury? These are just a few of the questions that explode from the action in James Simon's book. As you ponder cases such as Roger Gilbert's attempt to get his conviction for bank robbery set aside because he claims that Judge Randolph Pearson induced his guilty plea by the promise of a lesser sentence than the one imposed, you will be introduced to a set of dynamics to which most of us have given little consideration. These dynamics concern the relationship of a judge to his or her fellow judges as well as to the prosecutors, defense attorneys, defendants, and employees of the court. The events, when viewed from the perspective of a judge, often take on a new light.

The reader is forced to examine his own set of values and, if an attorney, give thought to his own techniques of practice while worrying with Judge Barth over problems of crowded dockets, how much bail, if any, should be set, and how to resolve conflicts of trial settings. *The Judge* provides an excellent opportunity for one to give serious thought to many important subjects and problems while enjoying an entertaining and suspenseful book.

* Professor of Law, University of Mississippi. B.A. 1964, J.D. 1967, University of Mississippi.

MISSISSIPPI LAW JOURNAL

GENERAL INDEX

**VOLUME 47
1976**

**Published by
MISSISSIPPI STATE BAR
and
UNIVERSITY OF MISSISSIPPI SCHOOL OF LAW
UNIVERSITY, MISSISSIPPI**

Copyright © 1976, Mississippi Law Journal

THE HISTORY OF THE CITY OF LONDON

BY
JOHN STOW

THE
CITY OF LONDON

AND
THE COUNTY OF MIDDLESEX

IN
THE YEAR OF OUR LORD 1597

PRINTED BY
I. I. I.

SUBJECT INDEX

ANTITRUST LAW

Analysis of Decisions on Territorial Restrictions	244-50
Analysis of Statutory Standing Requirements Under the Clayton Act	507-08
Article III Analysis of Standing Under the Clayton Act	503-06
Direct Injury Approach As Test for Standing Under the Clayton Act	511-14
Doctrine of Ancillary Restraints	243-44
Economic Background of Territorial Restraints	240-41
Firm and Resolute Restraint Requisite	251-52
Judicial Interpretation of Section 4 of the Clayton Act	508-19
Legal Development of Rules Concerning Territorial Restrictions	241-50
Nature of Product Exception to Per Se Rule	252-55
Parties Insulated From Direct Impact of Antitrust Violations	512-14
Per Se and Rule of Reason Distinction Under the Sherman Act	241-43
Policy Analysis of Standing Requirements of Clayton Act	508-11
Policy of Sherman Act	239
Purposes of Section 4 of the Clayton Act	523
Sherman Act	239-59, 509
Standing to Sue Under Section 4 of the Clayton Act	502-25
Target Area Approach as Test for Standing Under the Clayton Act	514-19
Territorial Distribution Restrictions Under the Sherman Act	239-59
Types of Distribution Restrictions	240-41

ATTORNEYS' FEES

See TORTS

Attorneys' Fees as an Element of Punitive Damages	765-66
---	--------

CIVIL PROCEDURE

See PROCEDURE

CIVIL RIGHTS

See FEDERAL JURISDICTION

Book Review: <i>Simple Justice</i>	1023-25
EEOC "Right to Sue" Letter	546-48
Equal Employment Opportunity	545-59
History of the Civil Rights Acts of 1866 and 1871	547-48
Nexus Approach to State Action Under Fourteenth Amendment	1012-18
Ninety-day Period for Filing Charge With EEOC	545-59
Prosecutorial Immunity from Civil Liability Under 42 U.S.C. § 1983	812-21
Public Function Approach to State Action Under Fourteenth Amendment	1012-18
Resort to Company Grievance Procedure Does Not Toll 90-day Filing Period	545-47, 555-57
Section 1983 Damages	812-21

State Action Under 42 U.S.C. § 1983	1010-22
State Inaction in Preventing Discrimination	1014-15
State-Private Action Dichotomy Under Fourteenth Amendment	1012-18
Title VII of the Civil Rights Act of 1964	547-48
Tolling of 90-day Period for Filing Charge with EEOC	545-59

CLASS ACTIONS

See FEDERAL PROCEDURE; PROCEDURE

COMMERCIAL LAW

See FIXTURES

Contractors' Fixtures Under Article 9	866-67
Cut-off Devices in Consumer Credit Transactions	768-73
Effect of Adopting 1972 Official Text in Mississippi	927-41
Enforcement of FTC Anti-HDC Rule	780-85
Federal Trade Commission Anti-HDC Rule	774-80
FTC Action Against Seller to Enforce Anti-HDC Rule	781-83
General Rules of Priority Under Article 9 of the UCC	841-55
Meaning of Fixtures Under Mississippi's UCC	891-97
Meaning of Fixtures Under 1962 UCC	836-41
Meaning of Fixtures Under 1972 UCC	898-900
Perfection Rules Under Article 9	856-61
Perfection Rules Under Mississippi's UCC	870-79
Perfection Rules Under the 1972 UCC	916-22
Preservation of Consumers' Claims and Defenses	774-75
Priority Rules Under Mississippi's UCC	879-88
Priority Rules Under the 1972 UCC	901-15
Private Action Against Seller to Enforce Anti-HDC Rule	780-81
Proposed Change to Anti-HDC Rule	786-87
Real Estate Mortgages Covering Fixtures	861-63
Removability Rule Under the 1972 UCC	900
Secured Party's Right to Remove Fixtures in Event of Debtor's Default	855-56
Security Interests in Fixtures Under Mississippi's Uniform Commercial Code	831-941
Tenants' Fixtures Under Article 9	863-65
Transactions Affected by FTC Anti-HDC Rule	775-80

CONSTITUTIONAL LAW

Article I

History of Import-Export Clause	790-95
Materials Imported for Ultimate Use in Importer's Manufacturing Facility	795-96
Nondiscriminatory Ad Valorem Property Tax on Imported Goods	789-98
Original Package Doctrine	790-95, 797-98

Article III

Injury in Fact as Requirement of Standing	504-05
Standing to Sue Under Section 4 of the Clayton Act	502-25

Fifth Amendment

Privilege Against Self-Incrimination in Youth	
Court Delinquency Hearing	137-38
Showing Violation of "Substantial Cross Section" Rule	8
"Substantial Cross Section" Rule in Jury Selection	5-8

Sixth Amendment

Applicability of Harmless Error Rule to Right of Confrontation	120-22
Application to States Through Fourteenth Amendment	370-71
Balancing Test of Right to Speedy Trial	377-400
Confrontation Clause and Right to Cross-Examine Witness	115-20
Demand-Waiver Doctrine in Right to Speedy Trial	376-77
Development of Balancing Test of Right to Speedy Trial	378-400
Exceptions to Confrontation Clause	113-14
Forfeiture of Right of Confrontation	108-09
Interests Protected by Sixth Amendment Right to Speedy Trial	370
Nature of Right to Counsel During Custodial Interrogation	98-99
Right of Accused to be Present at Trial	107-09
Right of Confrontation and Informant's Privilege	122-23
Right of Confrontation Distinguished From Hearsay Rule	110-14
Right of Confrontation in Youth Court Delinquency Proceeding	139
Right of Criminal Defendant to Confront Witnesses	106-24
Right of Indigent to Court-Appointed Counsel	94-97
Right to Choose and Retain Counsel	92-94
Right to Counsel at Custodial Interrogation	99-101
Right to a Speedy Trial	367-400
Right to Speedy Trial for Persons Incarcerated in	
Other Jurisdictions	371-73
Scope of the Right to Assistance of Counsel	92-106
Showing Violation of "Substantial Cross Section" Rule	8
Stage of Proceedings Where Right to Counsel Attaches	94-97
"Substantial Cross Section" Rule in Jury Selection	5-8
Systematic Underrepresentation of Cognizable Class in Jury Selection	23-29
Waiver of Right of Confrontation	118-20
Youth as Judicially Cognizable Class in Jury Selection	8-25

Eleventh Amendment

Immunity Rationale of Eleventh Amendment in § 1983 Cases	804-07
Injunctions Against State Officials	143-55

Fourteenth Amendment

Due Process Problems of Mississippi Power of Sale Foreclosure	67-89
Hearing Requirement in Power of Sale Foreclosure Proceedings	73-78
Meaningful Notice Standard in Power of Sale Foreclosures	71-75

Nexus Approach to State Action	1012-18
Public Function Approach to State Action	1012-18
Showing Violation of "Substantial Cross Section" Rule	8
State-Private Action Dichotomy	1012-18
State Action in Power of Sale Foreclosure Proceedings	78-89
"Substantial Cross Section" Rule in Jury Selection	5-8

CONSTRUCTION LAW

Alternative Methods for Protection of Subcontractors and Materialmen	460-69
Bonding Provisions in Private Construction Contracts	457-60
Enforcement of Bonding Provisions in Private Construction Contracts	458
Execution of Construction Lien	443-46
General Construction Liens	439-48
Limitations on Bonding in Private Construction Contracts	458-60
Limitations on Effectiveness of Stop-Notice	455-57
Methods for Establishing Constructive Notice of Construction Liens	440-41
Parties Entitled to Lien Rights	442-43
Priority of Construction Liens	446-48
Proposed Changes in Mississippi's Construction Lien Laws	469-75
Stop-Notice Provisions Under Construction Lien Laws	448-52
Uncertainties Under Mississippi's Stop-Notice Provisions	452-55

CONTRACTS

See CONSTRUCTION LAW

Mississippi Law Governing Private Construction Contracts	437-75
--	--------

CORPORATIONS

Analysis of Valid Corporate Purposes for Going Private	984-86
Apportionment Formula for Allocating Multistate Business Income	353-59
Apportionment of Unitary Income of Affiliated Corporations	348-59
Appraisal Statutes for Determining Value of Shares	718-19
Book Review: <i>How to Form Your Own Corporation Without A Lawyer for Under \$50.00</i>	363-64
Corporate Dissolution as Remedy for Oppressive Conduct	494-98
Equitable Power of Courts to Remedy Oppressive Conduct	494-98
Factors Affecting Valuation of Shares in a Closely Held Corporation	721-36
Factors Considered in Determining Whether Dissolution is Warranted	488
Freeze-Out of Minority Interests Through Merger	986-92
Going Private Transactions	981-92
Judicial Interpretation of Factors Relevant to Valuation of Stock	736-39
Long-Form Merger	987
Oppression of Minority Shareholders	476-501
Oppressive Conduct Warranting Dissolution of the Corporation	481-88
Proposed Model for Determining Whether Corporate Dissolution is Necessary	488-93
Remedies Other Than Corporate Dissolution for Oppressive Conduct	499-500
Remedying Oppressive Conduct of Majority Shareholders	494-501

Rule 10b-5 Cause of Action for Corporate Mismanagement in Sale or Purchase of Securities	992-1001
Separate Accounting Method of Allocating Multistate Business Income	351-53
Short-Form Merger	987
Stock Transfer Restrictions	735-36
Valuation of Intangible Assets	725
Valuation of Physical Assets	723-25
Valuation of Shares for Estate Tax Purposes	719-20
Valuation of Shares in a Closely Held Corporation	715-42
Valuation of Shares in Light of Revenue Ruling 59-60	720-21
Valuation of Stock Purchase Agreements	716-18
Weighted Average Method of Valuing Shares in Close Corporation	739-41
What Constitutes Oppressive Conduct on Part of Majority Shareholders	477-85

COURTS

Book Review: <i>Appellate Judicial Opinions</i>	825-26
---	--------

CRIMINAL LAW

Analysis of Mississippi's Criminal Law Under the ERA	279-301
Book Review: <i>The Judge</i>	1027
Book Review: <i>The Victims</i>	169
Consensual Sexual Relations	297-99
Criminal Penalties for Shoplifting	268-70
Effect of Equal Rights Amendment on Mississippi's Sex Crimes Statutes	292-301
Prostitution	299-300
Seduction	296-97
Sexual Assault	294-96
Shoplifting	261-63, 268-70
Statutory Rape	296
Voyeurism	300-01

CRIMINAL PROCEDURE

Accused's Assertion of Right to Speedy Trial as Factor in Balancing Test	388-91
Applicability of Harmless Error Rule to Right of Confrontation	120-22
Balancing Test of Right to Speedy Trial	377-400
Base Point for Computing Length of Delay	380-81
Bifurcated Test on Burden of Proof in Entrapment Cases	604-06
Burden of Proof in Entrapment Cases	604-06
Burden of Proof with Respect to Finding of Prejudice	392-93
Concern Over Defendant's Competency as Reason for Delay	387-88
Confrontation Clause and Right to Cross-Examine Witness	115-20
Constitutional Right to a Speedy Trial	367-400
Creation of Entrapment Defense	212-24
Custodial Interrogation	99-101
Defendant's Assertion of Innocence Precludes Assertion of Entrapment Defense	610-11

Defendant's Right to Assert Alternate Defenses	
of Entrapment and Innocence	609-12
Delays Resulting from Continuances	411-13
Demand-Waiver Doctrine	376-77
Development of Balancing Test of Right to Speedy Trial	378-400
Discovery by Defense Counsel of Information	
Available to Prosecution	101-04
Due Process Defense in Entrapment Cases	592-93
Entrapment as a Matter of Law	573-80
Entrapment as an Affirmative Defense	609-10
Entrapment Defense in Federal Courts	211-36
Entrapment Defense in the Pre-Prohibition Era	212-16
Entrapment Defense in the Prohibition Era	211-24
Evidence of Predisposition in Entrapment Cases	606-08
Exceptions to Confrontation Clause	113-14
Exclusions from Time Limits Under Speedy Trial Act	409-11
Filing and Hearing of Motions as Reason for Delay	386-87
Focus on Governmental Conduct as Element of Entrapment	580-88
Forfeiture of Right of Confrontation	108-09
Four Factors of the Balancing Test	377-400
Impairment of Defense During Delay of Trial	393-97
Implementation of Speedy Trial Act	418-21
Informant's Privilege and Right of Confrontation	122-23
Interest of Minimizing Anxiety and Concern of Defendant	397-99
Interests Protected by Sixth Amendment Right to Speedy Trial	370
Investigatory Process as Reason for Delay	385-86
Legislative History of Speedy Trial Act of 1974	400-06
Length of Delay as Factor in Balancing Test	378-82
Mode of Defendant's Assertion of Right to Speedy Trial	388-89
Modern Developments in the Entrapment Defense in Federal Courts	573-619
Nature of Right to Counsel During Custodial Interrogation	98-99
Prejudice to Accused as Factor in Balancing Test	391-400
Procedure Under Speedy Trial Act for Bringing	
Accused Prisoner to Trial	413-15
Prosecution's Burden to Bring Defendant to Trial	391
Reason for Delay as Factor in Balancing Test	382-88
Right of Accused to be Present at Trial	107-09
Right of an Indigent to Court-Appointed Counsel	94-97
Right of Confrontation Distinguished from Hearsay Rule	110-14
Right of Criminal Defendant to Confront Witness	106-24
Right of Indigent Defendant to Adequate Appellate Review	94-95
Right of Indigent Defendant to Services of	
State-Appointed Expert Witnesses	105-06
Right of Indigent Defendant to Services Provided by State	104-06
Right to Choose and Retain Counsel	92-94
Right to Speedy Trial for Persons Incarcerated	
In Other Jurisdictions	371-73
Sanctions Imposed for Noncompliance with Time	
Requirement under Speedy Trial Act	415-17
Scope of Cross-Examination Under Right of Confrontation	117-18
Scope of the Right to Assistance of Counsel	92-106

Service of Indictment on Defendant	102-04
Speedy Trial Act of 1974	400-21
Stage of Proceedings Where Right to Counsel Attaches	94-97
Status of Informants in Entrapment Cases	608-09
Subjective Test of Entrapment	588-604
Supreme Court Recognition of Entrapment Defense	224-34
Time Limitations Under Speedy Trial Act	406-09
Waiver of Sixth Amendment Right of Confrontation	118-20

DAMAGES

Attorneys' Fees as Element of Punitive Damages	765-66
Expert's Role in Wrongful Death Cases	175-76, 179-97
Expert Testimony to Establish Wrongful Death Damages	175-76, 179-97
Fringe Benefits and Nonmarket Services	
As Element of Wrongful Death Damages	192-93
Human Life Value Calculations in Wrongful Death Cases	204-09
Income Tax Consequences of Wrongful Death Damage Awards	197-203
Method of Computation of Damages in Wrongful Death Cases	176-77
Mississippi Law on Punitive Damages	744-46
Net Present Value in Computation of Wrongful Death Damages	194-97
Past Earnings of Decedent as Indication of Earning Capacity	184-86
Pendent Jurisdiction and Recovery of Punitive Damages	759-63
Productivity and Inflation in Computation of	
Wrongful Death Damages	190-92
Punitive Damages and the Federal Securities Act	743-67
Recovery from Municipal Funds Under 42 U.S.C. § 1983	799-811
Recovery of Damages in Private Civil Action Under	
Truth in Lending Act	562-64
Section 1983 Damages	812-21
Use of Statistical Data in Wrongful Death Cases	177-78, 184-97
Wrongful Death	173-209

DEEDS OF TRUST

See MORTGAGES

Adequacy of Hearing in Foreclosure Proceedings	75-76
Automatic Reasonableness Standard in Use of Due-On Clauses	339-42, 344-47
Due-On Clause	337-47
Due-On Clause as Unreasonable Restraint on Alienation	337-47
Due Process Problems of Mississippi Power of Sale Foreclosure	67-89
Enforcement of Due-On Clauses to Maintain Interest Rates	339
Final Deprivation of Property Under Extrajudicial Foreclosure	73-75
Hearing Requirement in Power of Sale Foreclosure Proceedings	73-78
Notice Requirement in Power of Sale Foreclosure Proceedings	71-75
Origin and Nature of Power of Sale Foreclosure	68-71
Restraints Against Alienation	332-39, 344-47
Role of Equity in Enforcement of Due-On Clauses	343-44
State Action in Power of Sale Foreclosure Proceedings	78-79
Traditional Use of Due-On Clauses	338
Validity of Due-On Clause Reasonably Related	
to Protection of Lender's Security	339-47

Waiver of Notice and Hearing in Foreclosure Proceedings	77-78
DISCOVERY	
Adoption of Mississippi Rules of Discovery	37-38
Discovery by Defense Counsel of Information Available to Prosecution	101-04
DUE PROCESS	
Due Process and the Mississippi Youth Courts	124-42
Due Process Defense in Entrapment Cases	592-93
Due Process Problems of Mississippi Power of Sale Foreclosure	67-89
Hearing Requirement in Power of Sale Foreclosure Proceedings	73-78
Meaningful Notice Standard in Power of Sale Foreclosures	71-75
Mississippi Youth Court Law of 1946	124-42
Notice and Service of Process in Youth Court Proceedings	131-33
"Substantial Cross Section" Rule in Jury Selection	5-8
ECONOMICS	
<i>See</i> DAMAGES	
EDUCATION	
Book Review: <i>Simple Justice</i>	1023-25
EQUAL PROTECTION	
<i>See</i> CONSTITUTIONAL LAW	
EQUAL RIGHTS AMENDMENT	
Analysis of Mississippi's Criminal Law Under the ERA	279-301
Basic Principle and Scope of the Equal Rights Amendment	280-92
Differentiation Based Upon Physical Characteristic Unique to One Sex	287-88
Effect of ERA on Mississippi's Sex Crime Statutes	292-301
Right of Privacy as Limitation Upon Scope of ERA	288-92
ESTATE AND GIFT TAXATION	
Valuation of Shares in Closely Held Corporations	719-20
Valuation of Shares in Light of Revenue Ruling 59-60	720-21
EVIDENCE	
Admissions as an Exception to the Hearsay Rule	432-33
Book Review: <i>Evidence and the Trial Lawyer</i>	569-70
Burden of Proof in Youth Court Delinquency Proceeding	139
Distinction Between Traditional Hearsay Rule and Mississippi Rule	423-34
Evidentiary Rules in Youth Court Delinquency Proceeding	139-40
Evolution of Mississippi Hearsay Rule	425-28

Expert Testimony to Establish Wrongful Death Damages	175-76, 179-97
Hearsay Rule in Mississippi	423-434
Right to Confrontation Distinguished From Hearsay Rule	110-14
Rule 801 of Federal Rules of Evidence	423-24, 432
Scope of Cross-Examination Under Right of Confrontation	117-18

FEDERAL JURISDICTION

Ad Hoc Decisional Test for Implied Cause of Action	158
Civil Rights Jurisdiction Under 28 U.S.C. § 1343(3)	799-811
Definition of "Person" Within Meaning of 42 U.S.C. § 1983	800-10
Federal Election Campaign Act	156-57
Immunity Rationale of Eleventh Amendment in § 1983 Cases	804-07
Implied Cause of Action Under Federal Election Campaign Act	156-65
Implied Remedies Doctrine	157-62
Injunctions Against Pending State Court Proceedings	143-55
Injunctive Relief Under Federal Election Campaign Act	156-57
Pendent Jurisdiction	759-63
Recovery from Municipal Funds Under 42 U.S.C. § 1983	799-811
Standing to Challenge Composition of Jury	4-5
Status of Municipalities Under 42 U.S.C. § 1983	800-10
Test for Implied Cause of Action Under Federal Statutes	157, 163-65

FEDERAL PROCEDURE

Commencement of Action Under Federal and State Rules	51-53
Comparison of Federal Rules and Current Mississippi Practice	48-64
Joinder Under Rule 18 of Federal Rules of Civil Procedure	58-60
Judgements and Execution in Federal and State Courts	62-64
Pleadings and Motions in Federal and State Courts	53-58
Trial Procedure in Federal and State Courts	61-62

FIXTURES

Contractors' Fixtures	866-67
General Rules of Priority Under Article 9 of the UCC	841-55
Goods Becoming Fixtures After Non-Fixture Filing	922-24
Meaning of Fixtures Under Mississippi's UCC	891-97
Meaning of Fixtures Under the 1972 UCC	898-900
Meaning of Fixtures Under UCC Article 9	836-41
Mortgages Securing Future Advances	924-26
Perfection Rules Under Article 9 of the UCC	856-61
Perfection Rules Under Mississippi's UCC	870-79
Perfection Rules Under the 1972 UCC	916-22
Priority Rules Under Mississippi's UCC	879-88
Priority Rules Under the 1972 UCC	901-15
Real Estate Mortgages Covering Fixtures	861-63
Secured Party's Right to Remove Fixtures in Event of Debtor's Default	855-56
Security Interests in Fixtures Under Mississippi's Uniform Commercial Code	831-941
Tenants' Fixtures Under the UCC	863-65

FORECLOSURE

See DEEDS OF TRUST

HEARINGS

See DUE PROCESS

Hearing Requirement in Power of Sale Foreclosure Proceedings 73-78

HISTORY

Book Review: *Simple Justice* 1023-25
 Civil Rights Act of 1866 547-48
 Civil Rights Act of 1871 547-48
 Truth in Lending Act 560-65

INJUNCTIONS

Federal Action to Enjoin Pending State Court Civil Proceedings 152
 Federal Action to Enjoin Pending State Court Criminal Proceedings 143-55
 Injunctive Relief Under Federal Election Campaign Act 156-57
 Irreparable Injury Necessary to Justify Federal
 Intervention in State Prosecution 146-52
 Pendency of State Prosecution When Federal Injunctive
 Relief Sought 153-55
 Requirement of Federal Proceedings on the Merits 154-55

JUDGES

Book Review: *The Judge* 1027

JUDICIAL IMMUNITY

Good Faith Standard 818-19
 History of Doctrine of Judicial Immunity 812-18

JURIES

Book Review: *Jury Woman* 571-72
 Mississippi's Statutory Age Requirement for Jury Service 1-4, 16-30
 Racial Discrimination in Jury Selection Process 26-27
 Showing Violation of "Substantial Cross Section" Rule 8
 Standing to Challenge Composition of Jury 4-5
 "Substantial Cross Section" Rule in Jury Selection 5-8
 Systematic Substantial Underrepresentation of a Cognizable Class 23-29
 Youth as Judicially Cognizable Class in Jury Selection 8-25

JURISDICTION

See FEDERAL JURISDICTION

Exceptions to Original Jurisdiction of Youth Court 127-28
 Jurisdiction of Youth Court 126-28
 Retained Jurisdiction Over Adjudicated Delinquent Children 140-42

JUVENILES

Burden of Proof in Youth Court Delinquency Proceedings	139
Due Process and the Mississippi Youth Court	124-42
Evidentiary Rules in Youth Court Delinquency Proceeding	139-40
Exceptions to Original Jurisdiction of Youth Court	127-28
Jurisdiction of Youth Court	126-28
Mississippi Youth Court Law of 1946	124-42
Necessity of Petition Alleging Delinquency	128-29
Notice and Service of Process in Youth Court Proceedings	131-33
Privilege Against Self-Incrimination in Youth Court Delinquency Hearing	137-38
Quasi-Criminal Nature of Youth Court Commitment Proceedings	125-26
Retained Jurisdiction Over Adjudicated Delinquent Children	140-42
Right to Confrontation in Youth Court Delinquency Proceeding	139
Right to Counsel at Youth Court Delinquency Adjudication Hearing	137
Sufficiency of Petition Alleging Delinquency	129-31
Youth Court Certification Hearing	134-36
Youth Court Delinquency Adjudication Hearing	136-40

LABOR RELATIONS

See CIVIL RIGHTS

Book Review: <i>1975 Guidebook to Labor Relations</i>	823-24
---	--------

LANDLORD AND TENANT

See FIXTURES

LAW

Book Review: <i>A Theory of Justice</i>	827-29
Book Review: <i>Lawyer's Desk Book</i>	171

MISSISSIPPI SECURITIES LAW

See SECURITIES REGULATIONS

MORTGAGES

See DEEDS OF TRUST

Mortgages Securing Future Advances	924-26
Origin and Nature of Power of Sale Foreclosures	68-71

NEGLIGENCE

See TORTS

OIL AND GAS

See PUBLIC UTILITIES

Book Review: <i>The United States and International Oil</i>	167
---	-----

PARENT AND CHILD

See JUVENILES

PROCEDURE

See DISCOVERY; FEDERAL PROCEDURE

Commencement of Action Under Federal and State Rules	51-53
Comparison of Federal Rules and Current Mississippi Practice	48-64
Inherent Rulemaking Power of Mississippi Supreme Court	35-40
Joinder of Parties in State Practice	58-60
Judgments and Execution in Federal and State Courts	62-64
Legislative Response to Court's Assertion of Rulemaking Power	37-40
Mississippi's Advisory Committee on Rules of Civil Practice and Procedure	38-40
Necessity of Petition in Youth Court Commitment Proceeding	128-29
Pleadings and Motions in Federal and State Courts	53-58
Recommended Changes in Mississippi Civil Procedure	64-66
Survey of Procedural Reforms in Other Jurisdictions	40-48
Trial Judge's Initiation or Modification of Jury Instructions	35-37
Trial Procedure in Federal and State Courts	61-62
Youth Court Certification Hearing	134-36
Youth Court Delinquency Adjudication Hearing	136-40

PRODUCTS LIABILITY

See TORTS

Adequacy of Drug Manufacturer's Warning of Known Dangers	534-35
Defenses to Strict Liability	541
Duty of Drug Manufacturer to Warn Consumer of Known Dangers	528-34
Foreseeability of Injury to Allergic or Idiosyncratic Individuals	527-28, 530-31
Physician's Liability for Allergic Drug Reactions	535-37
Restatement of Torts and Strict Liability for Allergic Drug Reactions	537-39
Theories Underlying Imposition of Strict Liability for Allergic Drug Reactions	539-41

PROPERTY

See DEEDS OF TRUST; FIXTURES; MORTGAGES

Adequacy of Hearing in Foreclosure Proceeding	75-76
Due Process Problems of Mississippi Power of Sale Foreclosure	67-89
Final Deprivation of Property Under Extrajudicial Foreclosure	73-75
Hearing Requirement in Power of Sale Foreclosure Proceedings	73-78
Notice Requirement in Power of Sale Foreclosure Proceedings	71-75
Origin and Nature of Power of Sale Foreclosure	68-71
State Action in Power of Sale Foreclosure Proceedings	78-89
Waiver of Notice and Hearing in Foreclosure Proceedings	77-78

PUBLIC UTILITIES

Advantages and Disadvantages of the Fuel Adjustment Clause	309-314
Application of Antitrust Laws to the Electric Utility Industry	695-702
Application for Certificate of Public Convenience and Necessity	653
Application of Common Carrier Rules to Electric Utility Regulation	685-88
Appraisal of Mississippi Regulatory Policy	681-89
Competition Between Municipal Franchisees and Other Regulated Utilities	675-80
Competition in the Electric Utility Industry	689-95
Certificate of Public Convenience and Necessity and State Regulatory Policy	651-58
Federal Preemption in Field of Public Utilities Regulation	702-11
FPC Formula for Computing the Adjustment Factor	308-09
FPC Jurisdiction Over Electric Power Companies	702-11
Fuel Adjustment Clause	306-08
Fuel Adjustment Clause and its Role in Utilities Regulation	302-17
General Characteristics of the Certificate of Public Convenience and Necessity	653-54
Mississippi Regulatory Policy in the Electric Utility Industry	645-712
Origins of Public Utility Regulation	647-51
Problem of Inflation and the Regulatory Lag	305-06
Rate Hearings	305
Regulated Competition Concept and the Electric Utility Industry	689-702
Regulated Electric Utilities Operating Outside Municipal Boundaries	661-75
Regulatory Process	304-06
State's Power to Formulate Utility Regulatory Policy	655-58
Two Views Concerning Degree to Which Utility Competition Should Be Restricted	655-56

REAPPORTIONMENT

Application of One-Man, One-Vote Doctrine to Local Governmental Units	968-74
Development of the One-Man, One-Vote Doctrine	943-52
History of Litigation on Reapportionment of Mississippi Legislature	952-56
Reapportionment of Local Governmental Units	968-77
Reapportionment of the Mississippi Legislature	952-68
Reapportionment on the Local Level in Mississippi	974-77
Reapportionment Plan for Election of the Mississippi Legislature	958-60
Section 5 of the Voting Rights Act of 1965	956-58

SALES

See COMMERCIAL LAW

SECURED TRANSACTIONS

See COMMERCIAL LAW; FIXTURES

SECURITIES REGULATIONS

Analysis of Corporate Mismanagement Cases	992-1001
---	----------

Analysis of Valid Corporate Purposes for Going Private	983-86
Civil Actions for Damages Under the Securities Act of 1933	754-57
Elements of Cause of Action Under Rule 10b-5	1002-05
Express Liability Provisions of the Federal Securities Acts	746-49
Freeze-Out of Minority Interests Through Merger	986-92
Going Private Transactions	983-92
Implied Civil Actions Under the Federal Securities Acts	749-59
Nondisclosure as Element of Cause of Action Under Rule 10b-5	1002-07
Pendent Jurisdiction and Recovery of Punitive Damages	759-63
Punitive Damages and the Federal Securities Act	743-67
Punitive Damages in Implied Actions Under the Securities Exchange Act of 1934	750-54
Role of Policy Considerations in Denial of Punitive Damages Under Federal Securities Law	757-59
Rule 10b-5 Cause of Action for Corporate Mismanagement in Sale of Purchase of Securities	992-1001
Rule 10b-5 Liability and Damages	764-65
Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934	750-54

SOCIAL SECURITY ACT

Assertion of PSRO Norms of Care on Motion for Summary Judgment	635-40
Confidentiality of PSRO Deliberations and Data on Particular Patients	634-35
Functions of Professional Standards Review Organizations [PSRO]	622-23
Medical Malpractice Immunity Provision of PSRO	623-26
Professional Standards Review Organizations [PSRO]	621-44
Professional Standards Review Organizations and Medical Malpractice Immunity	621-44
Prospective Analysis of PSRO's Immunity Provision	632-42
PSRO Norms as a Basis for Malpractice Liability	640-42
PSRO Norms, Standards, and Criteria	626-31
Purpose of PSROs	621-22
Scope and Coverage of PSRO Immunity Provision	632-35
Social Security Act Amendments of 1972	621-44

STANDING

See CONSTITUTIONAL LAW

STATE TAXATION

Apportionment Formula for Allocating Multistate Business Income	353-59
Apportionment of Unitary Income of Affiliated Corporations	348-59
Methods of Dividing and Allocating a Multistate Business Income	350-59
Separate Accounting Method of Allocating Multistate Business Income	351-53

STATUTES

Administrative Procedure Act	519-23
------------------------------	--------

Civil Rights Act of 1866	547-48
Civil Rights Act of 1871	146-47, 547-48, 813-14
Civil Rights Act of 1968	564
Clayton Act	502-25
Consumer Credit Protection Act	560-67
Federal Anti-Injunction Statute	144-55
Federal Election Campaign Act	156-57
Federal Power Act	702-11
Federal Rules of Evidence	423-24, 432
Federal Trade Commission Act	779-80
Harrison Anti-Narcotic Drug Act	224
Mississippi Business Corporation Law	718-19
Mississippi Motor Carriers Act	663
Mississippi Rules of Discovery	37-38
Mississippi Shoplifting Law	262-63, 268-70
Mississippi Youth Court Law of 1946	124-42
Mississippi's Construction Lien Laws	437-75
Mississippi's Sex Crimes Statutes	292-301
Mississippi's Uniform Commercial Code	831-941
National Prohibition Act	222
Public Utilities Act of 1956	305, 646-47, 661-64
Rail Passenger Service Act	159-60
Rivers and Harbors Appropriation Act of 1899	160-61
Securities Act of 1933	743-67
Securities Exchange Act of 1934	158-59, 743-67
Securities Investor Protection Act	162
Sherman Act	239-59
Social Security Act Amendments of 1972	621-44
Speedy Trial Act of 1974	365-422
Tax Reform Act of 1969	361-62
Title VII of the Civil Rights Act of 1964	545-59
Truth in Lending Act	560-67
Uniform Commercial Code	768-88
Uniform Mechanics Lien Act	465-67
Voting Rights Act	160

TAXATION

See ESTATE AND GIFT TAXATION; STATE TAXATION

Book Review: <i>What You Must Know to Manage a Charitable Foundation</i>	361-62
Income Tax Consequences of Wrongful Death Damage Awards	197-203
Nondiscriminatory Ad Valorem Property Tax on Imported Goods	789-98

TORTS

See SOCIAL SECURITY ACT

Adequacy of Drug Manufacturer's Warning of Known Dangers	534-35
Attorneys' Fees as an Element of Punitive Damages	765-66
Defenses to Strict Liability	541
Duty of Drug Manufacturer to Warn Consumer of Known Dangers	528-34

ARTICLES

By Authors

DANIEL FENTON ADAMS

Security Interests in Fixtures Under Mississippi's
Uniform Commercial Code

831

ROBERT F. CARTER

Medical Malpractice Immunity: A Realistic Prognosis
for the Social Security Act's Civil Immunity Provision

621

CHARLES N. DENNIS, WILLIAM A. SIRMON AND ROBERT D. DRINKWATER

Wrongful Death Damages-Fair Compensation for Future
Pecuniary Loss Requires Consideration of Economic
Trends and Income Tax Consequences

173

VAGN K. HANSEN AND WILLIAM N. REED

The Speedy Trial Act of 1974 in Constitutional Perspective

365

THOMAS J. GINGER AND CHARLES M. POWERS

Mississippi Juror Age Requirement—Unfair to the Defendant,
Unfair to the Young, and Unfair to the Public—
Is it Constitutional?

1

THOMAS R. MASON AND WAYNE HENGEN

The Hearsay Rule in Mississippi: "Out of the Presence of the
Adverse Party—In the Presence of the Adverse Party"

423

KENNETH M. MURCHISON

The Entrapment Defense in Federal Courts: Emergence
of a Legal Doctrine

211

KENNETH M. MURCHISON

The Entrapment Defense in Federal Courts: Modern Developments

573

RUBEL L. PHILLIPS

Mississippi Regulatory Policy in the Electric Utility Industry

645

THOMAS VOCINO, JOHN H. MORRIS AND D. STEVE GILL

The Population Apportionment Principle: Its Development
and Application to Mississippi's State and Local
Legislative Bodies

943

ARTICLES

By Title

- The Entrapment Defense in Federal Courts: Emergence of a
Legal Doctrine *Kenneth M. Murchison* 211
- The Entrapment Defense in Federal Courts:
Modern Developments *Kenneth M. Murchison* 573
- The Hearsay Rule in Mississippi: "Out of the Presence
of the Adverse Party—In the Presence of the
Adverse Party" *Thomas R. Mason and Wayne Hengen* 423
- Medical Malpractice Immunity: A Realistic Prognosis For the
Social Security Act's Civil Immunity Provision . . . *Robert F. Carter* 621
- Mississippi Juror Age Requirement—Unfair to the Defendant,
Unfair to the Young, and Unfair to the Public—Is it
Constitutional? *Thomas J. Ginger and Charles M. Powers* 1
- Mississippi Regulatory Policy in the Electric Utility
Industry *Rubel L. Phillips* 645
- The Population Apportionment Principle: Its Development and
Application to Mississippi's State and Local Legislative
Bodies. *Thomas Vocino, John H. Morris and D. Steve Gill* 943
- Security Interests in Fixtures Under Mississippi's Uniform
Commercial Code *Daniel Fenton Adams* 831
- The Speedy Trial Act of 1974 in Constitutional Perspective
. *Vagn K. Hansen and William N. Reed* 365
- Wrongful Death Damages—Fair Compensation for Future Pecuniary
Loss Requires Consideration of Economic Trends and Income
Tax Consequences *Charles N. Dennis, William A. Sirmon and
Robert D. Drinkwater* 173

COMMENTS

- An Analysis of Mississippi's Criminal Law Under the Equal
Rights Amendment *Norman Albert Mott, III* 279
- Criminal Procedure in Mississippi: A Summary of the Right to
Assistance of Counsel, the Right of Confrontation, and
Juvenile Quasi-Criminal Proceedings *John Henry Crouch* 91

Due Process Problems of Mississippi Power of Sale Foreclosure	<i>Paul J. Delcambre, Jr.</i>	67
The Fuel Adjustment Clause and its Role in the Regulatory Process	<i>Sidney Jerald Martin</i>	302
Going Private and Rule 10b-5: The <i>Green</i> and <i>Marshel</i> Decisions	<i>David Palmer Jaqua and Dan W. Webb</i>	981
Mississippi Law Governing Private Construction Contracts: Some Problems and Proposals	<i>William L. Smith and Boswell Stevens Hazard</i>	437
Oppression of Minority Shareholders: A Proposed Model and Suggested Remedies	<i>John Henegan</i>	476
Preservation of Consumer Claims and Defenses: Miller's Tale Tolled by FTC (Or is it?)	<i>Michael Talmadge Lewis and Gregg Lindsey Spyridon</i>	768
Probate of Lost Wills in Mississippi	<i>Paul R. Lambert</i>	318
Procedural Reform in Mississippi: A Current Analysis	<i>Eric Campbell Schweitzer and Francis McRae Turner, III</i>	33
Punitive Damages and the Federal Securities Act: Recovery Via Pendent Jurisdiction	<i>Richard Devon Gamblin and Paul Houston Stephenson, III</i>	743
Standing to Sue Under Section 4 of the Clayton Act: Direct Injury, Target Area, or Twilight Zone	<i>William Norman Krucks</i>	502
Stopping and Questioning Suspected Shoplifters Without Creating Civil Liability	<i>Jack Raymond Reed, Jr.</i>	260
Strict Liability and Allergic Drug Reaction	<i>Richard F. Yarborough, Jr.</i>	526
Territorial Restrictions Under the Sherman Act: Confusion in the Aftermath of <i>Schwinn</i>	<i>Robert Dudley Davidson</i>	239
Valuation of Shares in a Closely Held Corporation	<i>Jamie Giles Houston, III and Dalton McBee Mounger</i>	715

RECENT DECISIONS

CIVIL RIGHTS

Equal Employment Opportunity—Statute of Limitations for Filing a Charge with the EEOC is Not Tolled for the Period an Employee Seeks Relief Through a Company's Grievance Procedures (*Guy v. Robbins & Myers, Inc.*, 6th Cir. 1975) . . . *T. Franklin Myers, Jr. and Steven Allen Riley* 545

Section 1983 Damages—Prosecutor Has Absolute Immunity from Civil Liability for Acts Committed Within the Scope of His Duties (*Imbler v. Pachtman*, U.S. 1976) *Frank J. Hammond, III* 812

CONSTITUTIONAL LAW

State Action—Nominal Lease of Municipal Land, Coupled with Nonenforcement of City Ordinances Prohibiting Racial and Religious Discrimination, Not Sufficient to Implicate the State (*Golden v. Biscayne Bay Yacht Club*, 5th Cir. 1976) *Richard G. Cowart and T. David Cowart* 1011

State Taxation—Nondiscriminatory Ad Valorem Property Tax on Imported Goods No Longer in Transit Not Violative of Import-Export Clause (*Michelin Tire Corp. v. Wages*, U.S. 1976) *Jeffrey A. Walker* 789

DEEDS OF TRUST

Restraints Against Alienation—Due-on Clause is an Unreasonable Restraint on Alienation Absent a Showing of Protection of Mortgagee's Legitimate Interests (*Sanders v. Hicks*, Miss. 1975) *James Lawrence Jones and Charles David Swenson* 331

FEDERAL COURTS

Injunctions Against State Court Proceedings—State Prosecution Considered Pending if Commenced Prior to Federal Proceedings of Substance on the Merits (*Hicks v. Miranda*, U.S. 1975) *Sue Esther Bryant Dulin* 143

FEDERAL JURISDICTION

Civil Rights Jurisdiction Under 28 U.S.C. § 1343(3) Not Available When Equitable Monetary Relief, Sought Under 42 U.S.C. § 1983, Would Stem Directly From Municipal Funds (*Muzquiz v. City of San Antonio*, 5th Cir. 1976) *S. Allan Alexander and Fred Krutz, III* 799

Implied Cause of Action—No Private Remedy Available Under Federal Election Campaign Act (*Cort v. Ash*, U.S. 1975) *William Norman Reed* 156

STATE TAXATION

- Corporations—Unitary Income of Affiliated Corporations Not Apportionable in Same Manner as Unitary Income of Single Corporation (*Universal Manufacturing Corp. v. Brady*, Miss. 1975) Robert H. Pedersen 348

TRUTH IN LENDING

- Standing—Statutory Recovery Available Despite Absence of Actual Injury Since Statute Defines Injury in Fact (*White v. Arlen Realty & Development Corp.*, 4th Cir. 1975) Nancy Harrelson 560

BOOKS REVIEWED

- APPELLATE JUDICIAL OPINIONS by Robert A. Leflar
Reviewed by *Harry G. Walker* 825
- EVIDENCE AND THE TRIAL LAWYER edited by E. Pollack, A. Locke, and D. Sargent
Reviewed by *Thomas R. Mason* 569
- 1975 GUIDEBOOK TO LABOR RELATIONS
Reviewed by *Armin J. Moeller, Jr.* 823
- HOW TO FORM YOUR OWN CORPORATION WITHOUT A LAWYER FOR UNDER \$50.00 by Ted Nicholas
Reviewed by *E. Clifton Hodge, Jr.* 363
- THE JUDGE by James F. Simon
Reviewed by *Guthrie T. Abbott* 1027
- JURY WOMAN by Mary Timothy
Reviewed by *Betty A. Morgan* 571
- LAWYER'S DESK BOOK (4th Ed.) by William J. Casey
Reviewed by *Thomas R. Ethridge* 171
- SIMPLE JUSTICE by Richard Kluger
Reviewed by *Ben O. Weeks* 1023
- A THEORY OF JUSTICE by John Rawls
Reviewed by *Erwin Neumaier* 827

THE UNITED STATES AND INTERNATIONAL OIL by Robert B. Krueger Reviewed by <i>John M. Kuykendall, Jr.</i>	167
THE VICTIMS by Frank G. Carrington Reviewed by <i>Peter Halat</i>	169
WHAT YOU MUST KNOW TO MANAGE A CHARITABLE FOUNDATION by Stanley Pressment Reviewed by <i>Karen Oakes Green</i>	361

TABLE OF CASES

Cases in *italics* are the subject
of a Recent Decision, Comment,
or Article

Abate v. Mundt	973-74	Brown v. Hedahl's-Q. B. & R., Inc.	737-38
Adams v. Davis	325-26	Brown v. Maryland	791-93
Allee v. Medrano	152	Bryant v. Jefferson Fed. Sav. & Loan Ass'n.	86-88
Alexander v. Gardner-Denver Co.	551-53, 556-58	Burnett v. N.Y. Cent. Ry.	553-54, 557
Allen v. State Bd. of Elec.	975	Burton v. United States	116, 120-21
Allen v. State Bd. of Elections	160	Burton v. Wilmington Parking Authority	82, 1014-20
American Pipe & Constr. Co. v. Utah	553-54, 557	Bush v. Watkins	175
Anderson v. State	432-33	Butler v. W.E. Walker Stores, Inc.	266
Argersinger v. Hamlin	91	Butler Bros. v. McColgan	352-53
Arrant v. Wainwright	382	Butts v. United States	217-18
Association of Data Proc. Serv. Org., Inc. v. Camp	520-23		
Avery v. Midland County	970-74		
		California v. Green	111-14
Baker v. Carr	946-48	Cal-Maine Foods, Inc. v. Duvic	739
Baker v. Commercial Body Builders, Inc.	486-88	Campos v. Weeks	535-36
Ballard v. United States	10-11	Cantor v. Detroit Edison Co.	702
Baltimore Life Ins. Co. v. Harn	343-47	Capital Elec. Power Ass'n v. Mississippi Power & Light Co.	661-75, 678-80
Barker v. Wingo	367, 374-400, 402, 409, 416	Carter-Wallace, Inc. v. United States	253-55
Barnett v. Movers Conf. of Miss., Inc.	684-85	Casey v. United States	224-25, 230
Barrera v. Security Building & Inv. Corp.	87-88	Central Stand. Life Ins. Co. v. Davis	478
Basko v. Sterling Drug Co.	531-32	Central Trust Co. v. United States	738-39
Beavers v. Haubert	369, 374	Cermak v. United States	219-20
Berry v. Lowrey	320	Chambers v. Mississippi	115-16
Birnbaum v. Newport Steel Corp.	992-93	Chapman v. California	120-21
Bivens v. Six Unknown Named Fed. Narcotics Agents	161, 164, 810	Chapman v. Meier	956, 959-61
Bone v. Hibernia Bank	566	Cherry v. Home Sav. & Loan Ass'n	340-42
Boyle v. Landry	150	Christofferson v. Kaiser Foundation Hosp.	530-31
Bradley v. Fisher	814-15	City of Kenosha v. Bruno	802-03
Breed v. Jones	126	Civil Rights Cases	1012
Brent v. B. E. Brister Sawmill Co.	495	Clarke v. Edwards	425-26
Bright v. State	103-04	Coast Bank v. Minderhout	339-41, 343-45
Brodie v. Philadelphia Transp. Co.	178	Coffee v. Permian Corp.	763

Colegrove v. Green	944-45	Frankel v. Heym	181
Colorado Pump & Supply Co. v. Febeo, Inc.	251-52	Fuentes v. Shevin	67, 74-75
Conference of Studio Unions v. Loew's, Inc.	515-16	Gaffney v. Cummings	951
Connecticut Light & Power Co. v. FPC	706-07	Garner v. Tri-State Dev. Co.	86
Connor v. Johnson	952-54	Garrett v. Delta Motor Line	683-84
Connor v. Waller	957-58	Gideon v. Wainwright	91
Connor v. Williams	958-59	Gidwitz v. Lanzit Corrugated Box Co.	481-84
Cooper Liquor, Inc. v. Adolph Coors Co.	240, 248-59	Gilmore v. City of Montgomery	1017
Cort v. Ash (U.S. 1975)	156-65	Globus v. Law Research Serv., Inc.	755-57
Crowe v. Harrell	178	Golden v. Biscayne Bay Yacht Club (5th Cir. 1976)	1011-22
Culpepper v. Reynolds Metals Co.	552-53	Goldfarb v. Virginia State Bar	700-01
Davis v. Wyeth Laboratories	532	Gravis v. Parke, Davis & Co.	539
deHaas v. Empire Pet. Co.	754	Gray v. Sanders	948-49
Delta Elec. Power Ass'n v. Miss. Power & Light Co., Inc.	676-80	Greco v. Orange Mem. Hosp. Corp.	1017-19
Dewey v. Reynolds Metals Co.	550-51	Green v. Santa Fe Indus., Inc.	983, 1003
D.H. Overmeyer Co. v. Frick Co.	77-78	Green v. State	300
Dickey v. Florida	372-73, 413	Green v. Wolf Corp.	752-54
Dickson v. United States Fidelity & Guar. Co.	454-55	Greene v. United States	586-87
DiSalvo v. United States	218-19	Griffin v. Illinois	105
Dombrowski v. Pfister	148-49	Gulf States Util. Co. v. FPC	696-98
Doran v. Salem Inn, Inc.	150-52, 154	Guy v. Robbins & Myers, Inc. (6th Cir. 1975)	545-59
Douglas v. City of Jeannette	146-48	Hadley v. Junior College Dist.	970-74
Dusch v. Davis	969-73	Hall v. Clopton	426, 428
Edelman v. Jordan	805-06	Hall v. Garson	82
Eisen v. Carlisle & Jacquelin	758-59	Harkness v. Sweeny Ind. Sch. Dist.	806
Electric Power Ass'n v. Mississippi Power & Light	667	Harrington v. California	120-21
Ely v. Klahr	950-51	Henderson v. United States	611
Estate of Willis v. Willis	321-22	Herron v. Bondurant & Todd	426
Ex parte Young	146-47, 804-05	Hickman v. Taylor	54
Fayard v. Fayard	344	Hicks v. Miranda (U.S. 1975)	143-55
Field Prod., Inc. v. United Artists Corp.	517-18	Hilliard v. Williams	819-20
Fortson v. Dorsey	962-65, 969	Hooven & Allison Co. v. Evatt	794-95
Foster v. Sparks	27	Hopkins v. State	134-36
FPC v. Florida Power & Light Co.	705-06	Hopkins v. Youth Court	140
FPC v. Hope Natural Gas Co.	304	Huffman v. Pursue, Ltd.	152-55
FPC v. Southern Calif. Edison Co.	707	Hutchings v. United States Indus., Inc.	551-52
		Illinois v. Allen	108-09
		Imbler v. Pachtman (U.S. 1976)	812-21
		In re Dennis	130-31, 136

- In re Gault* 126, 132-33, 136-38
In re Gressett 130-31
In re Slay 130-31
In re Winship 126, 139
- Jackson v. Metropolitan Edison Co. 67, 84, 87-88, 1017-20
 Jackson v. Nicolai-Neppach Co. 496
 James v. Barber 324-25
 Janel Sales Corp. v. Lanvin Parfums, Inc. 251
 Jarl v. United States 222
 J.C. Penney Co. v. Cox 264-65, 270-71
 Jenkins v. Young 739
 J.I. Case Co. v. Borak 158-60, 164-65, 750
 Johnson v. Penrod Drilling Co. 181
 Johnson v. Railway Express Agency, Inc. 553-59
 Johnson v. State 19-20
 Johnston v. UpJohn Co. 531
- Kadis v. United States 605-06
 Kardon v. Nat'l Gypsum Co. 749
 Keith v. Bay Springs Tel. Co. 670, 672-75
 Kent v. United States 126, 134
 Klopfer v. North Carolina 370
- LaFortune v. Ebie 254-55
 LaSala v. American Sav. & Loan Ass'n 341-42
 Layne Cent. Co. v. Gulf Coast Ice Co. 896-97
 Lewis v. United States 590
 Liberbaum v. Surfcomber Hotel Corp. 345-47
 Linda R. S. v. Richard D. 564
 Lipscomb v. State 121-22
 Loeb v. Eastman Kodak Co. 511-12
 Logan v. Short 85
 Long v. Griffith 427
 Long v. Norwood Hills Corp. 480
 Long v. Wilson Stove & Mfg. Co. 481
 Lopez v. United States 589-90
 Louisiana Midland Transp. Co. v. Hearin-Miller Transp., Inc. 683-84
 Love v. Wolf 534-35
 Loving v. Virginia 298
 Low v. Austin 793-94
- McCaffrey v. Schwartz 178
 McElroy v. State 274
 McKeiver v. Pennsylvania 126, 140
 McNair v. M.L. Virden Lumber Co. 453-54
 McWeeney v. New York, N.H. & H.R.R. 200-01
 Mahan v. Howell 950-51, 958-60, 966-68
 Malamud v. Sinclair Oil Corp. 519-23
 Marsh v. Alabama 82, 1013-14
 Marshel v. AFW Fabric Corp. 983, 1002-09
 Masciale v. United States 573-74, 578-80
 May v. New Orleans 794
 Meadows v. F.W. Woolworth Co. 273
 Michelin Tire Corp. v. Wages (U.S. 1976) 789-98
 Miller v. Race 769
 Miranda v. Arizona 98-101, 273-74, 429
 Mississippi Power Co. v. South Miss. Elec. Power Ass'n 669-75
 Mississippi Power & Light Co. v. Delta Elec. Power Ass'n 666-67
 Mississippi Power & Light Co. v. Shepard 179-81
 Mississippi State Tax Comm'n v. Tennessee Gas Trans. Co. 353
 Mitchell v. W.T. Grant Co. 67, 73-75
 Mitchum v. Foster 150
 Monroe v. Pape 800-03, 807-11, 816
 Moor v. County of Alameda 801-02, 807-09
 Moore v. Arizona 390, 393
 Moore v. Bay 868-69
 Moose Lodge No. 107 v. Irvis 83, 87, 1016-19
 Morris v. Wyrick 384
 Mourning v. Family Publications Serv. Inc. 565
 Mullane v. Central Hanover Bank & Trust Co. 71-73
 Mulvey v. Samuel Goldwyn Prod. 516-17
 Munn v. Illinois 649-51
 Muzquiz v. City of San Antonio (5th Cir. 1976) 799-811
- National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers 159, 162-64

Nebbia v. New York	655, 711	Reynolds v. Sims	948-50, 961-63
Newman v. Avco Corp.	551	Reynolds v. United States	298-99
Newman v. United States	228-29	Righter v. United States	736-37
Newell v. State	35-40	Robinson v. United States	222
New State Ice Co. v. Liebmann	652	Rochin v. California	592-93
Northern Pac. Ry. v. United States	239	Roe v. Wade	289-91
North Georgia Finishing, Inc. v. Di-Chem., Inc.	75	Rothstein v. Jackson's of Coral Gables, Inc.	267-68
Northrip v. Federal Nat'l Mortgage Ass'n	76-78, 85-88	Ruckle v. Roto Am. Corp.	993-94
Norwood v. Harrison	1016-17	Rush v. State	109
O'Connor v. Donaldson	818	Sailors v. Bd. of Educ.	969-71
O'Neill v. Maytag	994-96	Salyer Land Co. v. Tulare Water Dist.	972-74
Osborne v. Mallory	749-50	Samuels v. Mackell	149
Pacific R. Co. v. Botsford	289-90	Sanchez v. Standard Brands, Inc.	549
Pappas v. Moss	763-64, 997-98	Sanders v. Hicks (Miss. 1975)	331-47
Parker v. Brown	700-02, 711	Sanders v. Sanders	323
People v. Frank	274	Sandura v. FTC	245-46
People v. Johnson	9, 11	Schaumberg v. State	274
Perez v. Ledesma	149-50	Scheuer v. Rhodes	818
Perkins v. Standard Oil Co.	514	Schneble v. Florida	120-22
Peters v. Kiff	4, 9	Schoenbaum v. Firstbrook	998-1000
Peterson v. United States	215, 230, 234	Scott-Burr Stores Corp. v. Edgar	266-67, 271
Pevey v. Alexander Pool Co.	424	Scott v. Paisley	79-81
Phinizee v. Alexander	325	Securities Investor Protection Corp. v. Barbour	162-65
Picking v. Pennsylvania	816	Schaefer v. First Nat'l Bank	761
Pierson v. Ray	816	Sharp v. State	130-32
Pointer v. Texas	106-07, 114	Shelley v. Kraemer	81
Polikoff v. Dole & Clark Bldg. Corp.	482-84	Sherman v. United States	573-81, 584, 587-88, 592-94, 604-05, 613-19
Pollard v. United States	369-70	Silk v. United States	221-22
Popkin v. Bishop	1000-01	Singer v. Sterling Drug, Inc.	533
Presley v. Quarles	425	Smith v. Brookshire Bros., Inc.	274-76
Prestage v. State	121-22	Smith v. Cox	381
Public Util. Comm'n v. Attleboro Steam & Elec. Co.	707-08	Smith v. Hooley	371-73, 381, 398-400, 413
Radiant Burners, Inc. v. Peoples Gas, Light & Coke Co.	524-25	Smith v. Milam	743-44, 764-66
Radovich v. Nat'l Football League	524	Snap-on Tools Corp. v. FTC	245
Raley v. Ohio	589-90	Sniadach v. Family Finance Corp.	67, 71, 73
Ratner v. Chemical Bank N.Y. Trust Co.	564-65	Sorrells v. United States	225-35, 573-78, 587-88, 593-94, 609-13, 617-18
Reeb v. Economic Opportunity Atlanta, Inc.	555-56	Southwest Drug Stores, Inc. v. Garner	265-66, 270-71
Reitman v. Mulkey	82, 1015	Standard Oil Co. v. United States	241-42

- Steffel v. Thompson 150-54
 Sterling Drug, Inc. v. Cornish 531
 Sterling Drug, Inc. v.
 Yarrow 529-30, 533
 Stevens v. Parke, Davis &
 Co. 534-35
 Stewart v. Waller 964-65
 Swarb v. Lennox 77-78

 Tangora v. Matanky 536
 Taylor v. Louisiana 4, 6-7
 Tenney v. Brandhove 816
 Texas & Pacific Ry. v.
 Rigsby 157-58, 163
 The Harrisburg 553-57
 The License Cases 792-93
 Thurston v. Dekle 808-09
 T.I.M.E., Inc. v. United States 159
 Toole v. Richardson-Merrell,
 Inc. 528-29
 Trafficante v. Metropolitan Life
 Ins. Co. 564
 Tripoli Co. v. Wella Corp. 252-55
 Tri-State Transit Co. v. Dixie
 Greyhound Lines 663-75, 678-85
 Tucker v. Lassen Sav. & Loan
 Ass'n 342, 345
 Tucker v. Pulaski Sav. &
 Loan Ass'n 343-47
 Tucker v. Whitehead 326
 Turner v. Blackburn 76-78, 86-87

 United Mine Workers v.
 Gibbs 759-60
 United States v. Addyston Pipe &
 Steel Co. 243-44
 United States v. Ambrose 607-08
 United States v. Archer 599-600
 United States v. Arnold,
 Schwinn & Co. 239, 246-59
 United States v. Bueno 585-87
 United States v. Butera 11, 24
 United States v. Chisum 583-86
 United States v. Colgate &
 Co. 255-57
 United States v. Cuomo 597-98
 United States v. Ewell 370-72
 United States v. Fink 598
 United States v. Guzman 9-11
 United States v. Hampton 601-03

 United States v. Jerrold
 Electronics 253
 United States v. Jones 389
 United States v. Lane 394
 United States v. Lara 382-83
 United States v. McGrath 587-88
 United States v. McKinney 607
 United States v. Macino 382, 394-95,
 397
 United States v. Marion 373, 380-81
 United States v. Meade 400
 United States v. Mitchell 610-11
 United States v. Oquendo 600-01
 United States v. Parke,
 Davis & Co. 256-58
 United States v. Perez 386
 United States v. Ricketson 389
 United States v. Roberts 386
 United States v. Russell 590-603
 United States v. Sealy, Inc. 258
 United States v. Singleton 386
 United States v. Taylor 386
 United States v. Topco
 Associates, Inc. 250
 United States v. Wells 598-99
 United States v. Williams 607
Universal Mfg. Corp. v. Brady
 (Miss. 1975) 348-59

 Veazey v. Turnipseed 322-24
 Vine v. Beneficial Fin. Co. 996-97
 Voves v. United States 215-16,
 228, 234

 Wann v. State 18-19, 22-23
 Warren v. Sidney's Estate 321-22
 Watkins v. Watkins 326
 Whitcomb v. Chavis 963-65
White v. Arlen Realty & Dev. Corp.
 (4th Cir. 1975) 560-67
 White v. Perkins 478, 485-86, 494-95
 White Motor Co. v.
 United States 244-45
 Williamson v.
 United States 581-84, 586
 Wood v. Strickland 818
 Woodruff v. Parham 792-93
 Woo Wai v. United States 212-20, 234
 Wortman & Mann, Inc. v. Frierson
 Bldg. Supply Co. 446-48, 452

Wyandotte Trans. Co. v.		Young v. Taylor	762-63
United States	160	Younger v. Harris	149-55
Yick v. United States	214-15	Youngstown Sheet & Tube Co. v.	
Yorston v. Pennell	536	Bowers	795-97

DARBY

THE "FIRST" COMPANY

- FIRST to use offset printing
- FIRST to use photo composition
- FIRST to use computers for galley correction accuracy
- FIRST to use laser scanners for typesetting speed & accuracy
- FIRST to use perfect binding
- FIRST and only to provide editor's day at printer's plant
- FIRST and only to use web offset for law review printing

Being "FIRST" has helped us be the "BEST"—The best service, quality & price in America. Being "BEST" has helped us become number "ONE"—The largest printer of college law reviews in the world. If you want the "BEST" give the "FIRST" company a call—Darby Printing Company.

"FIRST"
IN
QUALITY—SERVICE—PRICE

Darby Printing Company • 715 W. Whitehall St., S.W. • Atlanta, Georgia 30310
Telephone (404) 755-4521

Harrison's

CODE OF MISSISSIPPI



**UNANNOTATED EDITION
WITH INDEX**



1975
NOW AVAILABLE

This 1975 Unannotated Edition has been completely recompiled to include all 1975 legislation. Due to the high production cost, it will not be sent automatically to Harrison's Mississippi Code Annotated subscribers.

Copyright 1976, 8 7/8" x 10", 2,473 pages, perfect hardbound in green Buksyn Sanigal, stamped in bronze foil. To be supplemented for at least two years.

Ideal For:
Attorneys
Students
Libraries
Businesses

\$69.50
PLUS 5%
SALES TAX

***THE PERFECT COMPANION
to the Mississippi Code Annotated***

THE  HARRISON COMPANY, PUBLISHERS

3110 Crossing Park • Norcross, Georgia 30071

We make

Savings



OUR BUSINESS . . .

AND WITH OVER \$83,000,000 IN ASSETS WE ARE
BETTER ABLE TO SERVE THE NEEDS OF YOUR
CLIENTS THROUGHOUT NORTH MISSISSIPPI
WITH FIRST MORTGAGE HOME AND
COMMERCIAL REAL ESTATE LOANS OR AS A
LEGAL DEPOSITORY FOR ESTATES,
GUARDIANSHIPS, AND TRUST FUNDS.

Offices in

Booneville * Clarksdale * Cleveland
Grenada * Hernando * Horn Lake
Houston * New Albany * Oxford * Ponotoc
Ripley * Senatobia * Starkville



North Mississippi Savings & Loan Assoc.

